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Supreme Court of the United States

OCTOBER TERM, 1963

No. 29

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL., APPELLANTS,

vs.

J. MILLARD TAWES, GOVERNOR, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

FILED OCTOBER 24, 1962
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INDEX

	Original	Print
Proceedings in the Court of Appeals of the State of Maryland		
Appendix to brief of appellants containing portions of record from the Circuit Court for Anne Arundel County, Maryland		
Bill of complaint	3	1
Exhibit "A"—Maryland population figures as compiled by the U.S. Department of Commerce, Bureau of Census—1960	22	21
Exhibit "B"—Board of Revenue Estimates of Maryland Counties	23	23
Exhibit "C"—Comparison of allocation of motor vehicle registration to Maryland political subdivisions with population, road mileage and motor vehicle registrations	24	25
Exhibit "D"—Status of representation of counties and City of Baltimore in the General Assembly	25	27

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JULY 17, 1963

	Original	Print
Appendix to brief of appellants containing portions of record from the Circuit Court for Anne Arundel County, Maryland—Continued		
Bill of complaint—Continued		
Exhibit "E"—Reapportionment legislation introduced in the General Assembly of Maryland, 1951 through 1959	26	28
Exhibit "F"—Final report of the Commission on More Equitable Representation in the General Assembly of Maryland	28	30
Appendix—Federal census figures for Maryland, 1870-1960	43	47
Exhibit "G"—List of unsuccessful attempts to enact legislation calling for a constitutional convention, 1951 through 1959	44	48
Exhibit "H"—Letter from Executive Assistant to Governor J. Millard Tawes to Mr. Royce Hanson, dated July 11, 1960	46	49
Demurrer of Tawes, et al.	47	50
Demurrer of Hantske, et al.	48	52
Order for appeal	62	53
Opinion of the Court of Appeals, Prescott, J., April 25, 1962	63	54
Dissenting opinion, Henderson, J.	99	78
Mandate	113	87
Further record from the Circuit Court for Anne Arundel County, Maryland	113a	88
Order directing respondents to plead and setting case for hearing	113a	88
Answer	114	89
Exhibit I—Table II—Population of Maryland, by Counties: 1960 & 1950 (Maryland Manual)	122	97
Motion of petitioners for summary judgment	123	98
Opinion of May 24, 1962, Duckett, J.	126	100
Decree of May 28, 1962	136	110
Appeal from decree of May 28, 1962	138	111
Further proceedings in Court of Appeals of the State of Maryland	139	112

	Original	Print
Order directing remand of case for entry of proper decree	139	112
Mandate	140	112
Further record from the Circuit Court for Anne Arundel County, Maryland	141	113
Supplemental opinion of June 28, 1962	141	113
Decree of June 28, 1962	151	123
Appeal from decree of June 28, 1962	152	123
Further proceedings in the Court of Appeals of the State of Maryland	172	124
Per Curiam order of affirmance, July 23, 1962	172	124
Motion for reargument and denial thereof	174	125
Annex 1—Opinion of the United States District Court for the Middle District of Alabama in the case of Sims, et al. v. Frink, et al.	186	138
Annex 2—Interlocutory judgment and opinion of the United States District Court for the Southern District of Florida in the case of Sobel v. Adams	203	158
Opinion, Henderson, J., September 25, 1962	209	162
Dissenting opinion, Brune, C.J.	223	171
Appendix A—Population and Representation in The General Assembly of Maryland House of Delegates	242	185
Appendix B—Comparison of Representation in the Senate of Maryland, of the City of Baltimore and The Four Most Populous Counties and of Other Counties	244	189
Dissenting opinion, Prescott and Marbury, JJ.	245	190
Mandate	248	192
Notice of appeal to the Supreme Court of the United States	249	193
Clerk's certificate (omitted in printing)	253	196
Order noting probable jurisdiction	254	197

[fol. 1]

IN THE COURT OF APPEALS FOR MARYLAND

SEPTEMBER TERM, 1961

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL., Appellants,

v.

J. MILLARD TAWES, GOVERNOR, and BOARD OF STATE CANVASSERS, ET AL., Appellees.

Appendix to Brief of Appellants

[fol. 3]

IN THE CIRCUIT COURT OF ANNE ARUNDEL COUNTY, MARYLAND

BILL OF COMPLAINT—Filed August 12, 1960

Petitioners, by their Solicitors, complaining of the defendants, say that:

Jurisdiction and Venue

1. This is a bill of complaint in equity, seeking relief for the denial of rights guaranteed petitioners by the Constitution and laws of the United States and by the Constitution and Declaration of Rights of Maryland.

2. Jurisdiction over the action is conferred on this Court by the Maryland Constitution, as supplemented by the Maryland Code (1957).

3. Jurisdiction to issue the declaratory judgment for which petitioners hereinafter pray exists by virtue of Article 31A, Section 1 of the Code.

4. Venue in this Court is provided by Article 75, Section 75 of the Code.

The Parties to the Action

5. The petitioners:

(a) W. F. Strong is a citizen, taxpayer and eligible voter of Maryland, residing at 301 Hillmoor Drive, Silver Spring, Montgomery County.

(b) Newton I. Steers is a citizen, taxpayer and eligible voter of Maryland, residing at 6601 River Road, Bethesda, Montgomery County.

(c) Francis J. Fagan is a citizen, taxpayer and eligible voter of Maryland, residing at 3605 Buckingham Road, Baltimore County.

(d) John T. Doherty is a citizen, taxpayer and eligible voter of Maryland, residing at 12 Revell Street, Annapolis, Anne Arundel County.

(e) Andrew M. Bristow is a citizen, taxpayer and eligible voter of Maryland, residing at 8168 Glen Gary Road, Baltimore County.

[fol. 4] (f) Samuel Hopkins is a citizen, taxpayer and eligible voter of Maryland, residing at 4302 Wendover Road, Baltimore.

(g) The Maryland Committee for Fair Representation, a non-profit, unincorporated association, having its business address at 4907 Redford Road, Bethesda, Maryland. It brings this action in behalf of all its members. On information and belief, all of the members of the aforesaid Committee are citizens of the State of Maryland, taxpayers and eligible voters of this State. On information and belief, the very great majority of the Committee's members reside either in the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges, or in the City of Baltimore.

6. The parties defendant are:

(a) J. Millard Tawes, Governor of the State of Maryland, having his official place of business at the State House, Annapolis, Maryland.

(b) The Board of State Canvassers, an agency of the State of Maryland, created by statute, with offices at the

State House, Annapolis, Maryland, the members of which Board are the Secretary of State, the Comptroller of the Treasury, the Attorney General, the State Treasurer, and the Clerk of the Court of Appeals, all of whom are separately joined in this suit as individual defendants.

(c) Thomas B. Finan, Secretary of the State of Maryland, and a member of the Board of State Canvassers, having his official place of business in the State House, Annapolis, Maryland.

(d) Louis L. Goldstein, Comptroller of the Treasury, and a member of the Board of State Canvassers, having his official place of business in the State Treasury Building, Annapolis, Maryland.

(e) C. Ferdinand Sybert, Attorney General of Maryland, and a member of the Board of State Canvassers, having his official place of business in the State Office Building, Annapolis, Maryland.

(f) Hooper S. Miles, Treasurer of the State of Maryland, and a member of the Board of State Canvassers, having his official place of business in the State Office Building, Annapolis, Maryland.

[fol. 5] (g) James Lloyd Young, Clerk of the Court of Appeals, and member of the Board of State Canvassers, having his official place of business in the Court of Appeals Building, Annapolis, Maryland.

(h) The Board of Election Supervisors of Anne Arundel County is an agency of the State of Maryland, created by statute, the three members of which are appointed by the Governor, defendant Tawes. These are Douglas W. Hantske, Edgar A. Bowen, and Carroll A. Cole. The Board maintains offices in Room 107, Court House, Annapolis, Maryland.

Petitioners' Standing to Complain

7. Petitioner, The Maryland Committee for Fair Representation, is a non-profit, unincorporated association of this State, having the capacity to sue or be sued in its own name,

as provided in Article 23, Section 138 of the Code, and in accordance with Rule 207 of the Rules of Procedure.

8. The other petitioners herein are private persons, all citizens, taxpayers and eligible voters of Maryland, residing in the political subdivisions identified above. They bring this suit to prevent irreparable injury to their Constitutional rights, Federal and State, occurring in the past, and certain to occur in the future (unless declared illegal and enjoined by this Court) as a consequence of certain *ultra vires* actions on the part of the defendants, as hereinafter specified.

CAUSE OF ACTION

9. Article III, Section 2 of the Maryland Constitution provides:

> "The City of Baltimore shall be divided into six legislative districts as near as may be of equal population and of contiguous territory, and each of said legislative districts of Baltimore City, as they may from time to time be laid out, in accordance with the provisions hereof, and each county in the State, shall be entitled to one Senator, who shall be elected by the qualified voters of the said legislative districts of Baltimore City and of the counties of the State, respec- [fol. 6] tively, and shall serve for four years from the date of his election, subject to the classification of Senators hereafter provided for."

10. Article III, Section 5 of the Maryland Constitution provides:

> "Notwithstanding the provisions of Section 4 of this Article, the membership of the House of Delegates shall consist of one hundred and twenty-three (123) Delegates, apportioned as follows: Calvert, Caroline, Charles, Howard, Kent, Queen Anne's, and St. Mary's Counties, two Delegates each; Cecil, Garrett, Somerset, Talbot and Worcester Counties, three Delegates each; Carroll, Dorchester, Harford, and Wicomico Counties, four Delegates each; Allegany, Anne Arundel, Balti-

more, Frederick, Montgomery, Prince George's, and Washington Counties, and each of the six legislative districts of Baltimore City, six Delegates each."

11. No provision of the Maryland Constitution, or any other provision of statute or the law of Maryland, expressly provides for the reapportioning or the revising of the representation in the General Assembly of Maryland which is now established by Article III, Sections 2 and 5, of the Maryland Constitution.

12. Article XIV, Section 1 of the Maryland Constitution provides:

"The General Assembly may propose amendments to this Constitution; provided, that each amendment shall be embraced in a separate bill, embodying the Article or Section, as the same will stand when amended and passed by three-fifths of all the members elected to each of the two Houses by yeas and nays, to be entered on the Journals with the proposed Amendment. The bill or bills proposing amendment or amendments shall be published by order of the Governor, in at least two newspapers, in each County, where so many may be published, and where not more than one may be published, then in that newspaper, and in three newspapers published in the City of Baltimore, once a week for [fol. 7] four weeks, immediately preceding the next ensuing general election, at which the proposed amendment or amendments shall be submitted, in a form to be prescribed by the General Assembly, to the qualified voters of the State for adoption or rejection. The votes cast for and against said proposed amendment or amendments, severally, shall be returned to the Governor, in the manner prescribed in other cases, and if it shall appear to the Governor that a majority of the votes cast at said election on said amendment or amendments, severally, were cast in favor thereof, the Governor shall, by his proclamation, declare the said amendment or amendments having received said majority of votes, to have been adopted by the people of Maryland as part of the Constitution thereof, and

thenceforth said amendment or amendments shall be part of the said constitution. When two or more amendments shall be submitted in manner aforesaid, to the voters of this State at the same election, they shall be so submitted as that each amendment shall be voted on separately."

13. The 1960 populations of the 23 counties and the City of Baltimore, as officially compiled by the United States Department of Commerce, Bureau of Census, are set out in Exhibit A, which is attached to and made a part of this bill of complaint.

14. The 1960 population figures, based on the Federal census taken in 1960, as set out in Exhibit A, show that the present total population of the State of Maryland is 3,072,999. The total combined population of the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges and the City of Baltimore is 2,312,485. This is approximately 76% of the total 1960 population of the State. The population of the remaining 19 counties is 760,514, or about 24% of the State's total population.

15. Under the representation now provided for in Article III, Section 2 of the Maryland Constitution, the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges and the six legislative districts of the City of Baltimore each have one member in the State Senate, for [fol. 8] a total of 10 out of the 29 who comprise that body, or approximately 34% of the total representation in the State Senate.

16. Under the representation established in Article III, Section 5 of the Maryland Constitution, the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges and the six legislative districts of the City of Baltimore have a total of 60 representatives out of a total of 123 who comprise the House of Delegates, or approximately 49% of the total representation in that House.

17. Attached hereto as Exhibit B and made a part hereof, is a schedule of the receipts and distributions to the various political subdivisions of various State revenues collected

for the fiscal year ending June 30, 1959, as computed by the State Board of Revenue Estimates. The aforesaid schedule shows that the four Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges, and the City of Baltimore, collectively contributed the following amounts and percentages of the total revenue collected for the fiscal year concerned:

Amount of Revenue Contributed		Percentage of State Total Collected
Income Tax	$58,355,673.47	84%
Sales and Use Taxes	40,565,282.35	73%
Corporation Franchise Tax	433,328.62	83%
Business Licenses	1,505,071.76	70%

18. Attached hereto as Exhibit C and made a part hereof is a schedule containing the current (1960) allocation of motor vehicle registration revenue to the various political subdivisions of Maryland. Exhibit C shows that the four Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges and the City of Baltimore contain, collectively, 20.6% of the total area of Maryland; 32.3% (Baltimore City excluded) of county road mileage in the State; and 72.4% of the motor vehicle registrations. Schedule C also shows, however, that the Counties of Anne Arundel, Baltimore, Prince Georges and Montgomery (excluding Baltimore City) received only 31.9% of the distribution of motor vehicle registration revenues to the political subdivisions of the State.

[fol. 9] 19. Exhibit B, as referred to in paragraph 17 above, shows that the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges received back from the State $3,244,764.78, or 12% of the total allocation to the various political subdivisions of the State of the motor vehicle fuel tax collected in the fiscal year ended June 30, 1959. Exhibit C, as referred to in paragraph 18 above, shows that these four counties contain 46.6% of the total motor vehicle registrations in Maryland.

The Petitioners Are Being Denied Equal Protection Of The Law

20. Section 1 of the Fourteenth Amendment of the Constitution of the United States provides as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

21. Section 1 of the Fourteenth Amendment prohibits a State, or any agency or officer thereof, from denying, diluting or restricting the equality of voting rights or privileges among classes of otherwise eligible voters similarly situated.

22. Section 1 of the Fourteenth Amendment requires that representation in the State Senate of Maryland be based on, or reasonably related to, the present population of the counties and the City of Baltimore, and that the total number of members in that body to which the counties of Anne Arundel, Baltimore, Montgomery, Prince Georges and the City of Baltimore are entitled is 22, instead of the 10 Senators through whom they are now represented in that body (assuming no increase in its present membership of 29 Senators).

[fol. 10] 23. Section 1 of the Fourteenth Amendment requires that representation in the House of Delegates be based on, or reasonably related to, the present population of the counties and the City of Baltimore, and that the total number of members in that body to which the counties of Anne Arundel, Baltimore, Montgomery and Prince Georges and the City of Baltimore are entitled is 92, instead of the 60 Delegates through which they now are represented in that body (assuming no increase in its present membership of 123 Delegates).

24. Sections 2 and 5 of Article III of the Maryland Constitution, as originally proposed by the Constitutional Convention of 1867, and as subsequently adopted and amended, have for one of their prime purposes the creation and continuance of a discrimination against the representation enjoyed in the General Assembly of Maryland on the part of the urban areas of the State, by giving a much higher percentage of representation in both the State Senate and the House of Delegates to the less populous counties than the representation to which those counties would be entitled were the representation in the General Assembly based on population, or reasonably related thereto.

25. Attached hereto as Exhibit D and made a part hereof, is a schedule showing the status of representation now enjoyed in the General Assembly by the various political subdivisions of Maryland. Among other instances of existing malapportionment of representation, as between subdivisions, Exhibit D shows that:

(a) The Counties of Anne Arundel, Baltimore, Prince Georges and Montgomery and the City of Baltimore are the only political subdivisions of the State subjected to under-representation in the General Assembly which, in the House of Delegates, varies in percentage from 3% (in the case of Baltimore City) to 225% (in the case of Baltimore County).

(b) All of the other political subdivisions of the State enjoy over-representation in the House of Delegates, ranging from 23% of over-representation (in the case of Harford County) to 74% (in the case of Somerset County).

[fol. 11] (c) Kent County, with a population of 15,317 has two representatives in the House of Delegates and one representative in the State Senate, whereas Baltimore County, with a population of 490,201 has six representatives in the House of Delegates and one in the State Senate.

(d) Each of the four representatives of Dorchester County in the House of Delegates represents 7,399 persons, while each of the six representatives of Baltimore County in the House of Delegates represents 81,700 persons.

(e) Each of the three representatives of Talbot County in the House of Delegates represents 7,173 persons, while each of the six representatives of Prince Georges County in the House of Delegates represents 59,343 persons.

26. Sections 2 and 5 of Article III of the Maryland Constitution, by failing to base representation in the General Assembly on population, or on some formula approximating the present respective populations of the counties and the City of Baltimore, now illegally discriminate against the eligible voters of Anne Arundel, Baltimore, Montgomery and Prince Georges Counties and the City of Baltimore, including petitioners herein, in violation of the equal protection of the laws provision of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

27. The representation in the General Assembly now provided for in Sections 2 and 5 of Article III of the Maryland Constitution, for the reasons above alleged, also violates the Federal Civil Rights statutes, as found in 28 U.S.C. 1343 (3) and (4), and in 42 U.S.C. 1983.

28. As a consequence of the unconstitutional and otherwise illegal denial of federally guaranteed rights which is visited upon the petitioners and other citizens of Maryland who reside in the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges, or in the City of Baltimore, as above alleged, and as a further consequence of the preferential political power which the present illegal system of representation in the General Assembly affords to the other less populous counties of the State, these petitioners and other eligible voters and taxpayers residing in the Counties of Anne Arundel, Baltimore, ~~Montgomery~~ and Prince Georges and the City of Baltimore are suffering [fol. 12] financial injury in being required to contribute a greater share of State revenue and to receive back a lesser pro rata share of such revenue as is returned by the State to the political subdivisions under equalization formulas enacted by the General Assembly than would be required of them if representation in the General Assembly were based on population, or reasonably related thereto, and were the relative weight of the vote of each eligible voter of Maryland roughly equal.

29. The above illegal discrimination in representation in the General Assembly to which the residents of the above referred to four counties and the City of Baltimore are subjected, as specifically alleged in paragraphs 19 through 28 hereof, also violates Article 7 of the Maryland Declaration of Rights.

No Legislative Relief Is Available to Petitioners

30. From 1951 through 1959, at least ten bills were introduced in the General Assembly of Maryland for the purpose of achieving some reapportionment of or change in the representation now provided for in the Maryland Constitution. All of these attempts are identified in Exhibit E, attached to and made a part of this bill. All of the reapportionment proposals thus introduced in the General Assembly in 1951 through 1959 failed of passage because of the opposition of the Delegates and State Senators representing the less populous counties.

31. In February 1959, defendant Tawes, Governor of this State, appointed a Commission, known as the Commission On More Equitable Representation in the General Assembly of Maryland (hereinafter referred to as the Walsh Commission, after the name of its Chairman).

32. On December 31, 1959, the Walsh Commission submitted its final report to the Governor, a copy of which is attached to this bill as Exhibit F and made a part hereof. The Commission recommended a plan of reapportionment under which each County in Maryland would have a minimum delegation of two to the General Assembly; but when the population in any county reached 50,000, such county would be entitled to three delegates; when its population reached 75,000, it would be entitled to four; when it reached [fol. 13] 100,000, it would be entitled to five; when it reached 150,000, it would be entitled to six; and when it reached 200,000, it would be entitled to seven representatives in the House of Delegates. The Walsh Commission also recommended that for each 100,000 increase in population, a county be entitled to one more seat until its delegation in the House of Delegates reached a maximum of ten. The

Committee recommended against any change in apportionment under which any political subdivision of the State would lose any of its present representation in the House of Delegates. Moreover, the Walsh Commission also recommended that no change be made in the representation in the State Senate as now provided for in Article III, Section 2 of the Maryland Constitution.

33. Legislation incorporating the recommendations of the Walsh Commission was introduced in both the House of Delegates and the State Senate of Maryland after it convened for its 1960 session. The legislation as introduced included an amendment to provide for an increase in members to the House of Delegates from Baltimore City. Under the proposed legislation, the following increases in the House of Delegates would have been allowed.

Anne Arundel County,	instead of its present	6 Delegates	7
Baltimore County,	" " " "	6 "	9
Montgomery County,	" " " "	6 "	8
Prince Georges County,	" " " "	6 "	8
Baltimore City,	" " " "	36 "	38
Totals		60	70

34. The legislation incorporating the recommendations of the Walsh Committee, as amended, would have increased the combined representation in the House of Delegates of Anne Arundel, Baltimore, Montgomery and Prince Georges and the City of Baltimore from a total of 60 to 70, or approximately 56% of the total membership of the House of Delegates.

35. Legislation incorporating the provisions of the Walsh Committee, as amended, failed to pass either the House of Delegates or the State Senate, although introduced in both bodies at the 1960 session of the General Assembly.

36. Since Article XIV, Section 1 of the Maryland Constitution requires an affirmative vote of three-fifths (3/5ths) [fol. 14] of the membership of both the State Senate and House of Delegates for a constitutional amendment to be submitted to the voters for adoption or rejection, and the less populous counties of the State control 66% of the

representation in the State Senate and 51% of that in the House of Delegates, it is futile for petitioners to look to the General Assembly and the amendment process provided by Article XIV, Section 1, for relief from the unconstitutional apportionment of representation in the General Assembly to which they are now subjected, and of which they complain herein.

Violations of the State Constitution Confirming The Futility Of Seeking Relief From the General Assembly

37. Article XIV, Section 2 of the Maryland Constitution, as it read in 1950, provided an alternative method of amending that document, stating that:

> "It shall be the duty of the General Assembly to provide by Law for taking, at the general election to be held in the year eighteen hundred and eighty-seven, and every twenty years thereafter, the sense of the People in regard to calling a Convention for altering this Constitution; and if a majority of voters at such election or elections shall vote for a Convention, the General Assembly, at its next session, shall provide by law for the assembling of such convention and for the election of delegates thereto. Each County, and Legislative District of the City of Baltimore, shall have in such convention a number of Delegates equal to its representation in both Houses at the time at which the Convention is called. But any Constitution, or change, or amendment of the existing Constitution, which may be adopted by such Convention, shall be submitted to the voters of this State, and shall have no effect unless the same shall have been adopted by a majority of the voters voting thereon."

38. Article XVII, Section 9 of the Maryland Constitution, as it read in 1950, provided as follows:

> "The vote to be held under the provisions of Section 2 of Article XIV of the Constitution for the purpose [fol. 15] of taking the sense of the people in regard to calling a Constitutional Convention shall be held at

the general election in the year nineteen hundred and thirty, and every twenty years thereafter."

39. Pursuant to the above alleged provisions of the Maryland Constitution, a referendum was held in the 1950 general election with respect to the question of whether a Constitutional Convention should be convened. The proposal to hold a convention was approved by a vote of 200,439 to 56,998.

40. Bills were introduced at the next session of the General Assembly, following the above alleged referendum approving a Constitutional Convention, for the purpose of convening the Convention approved in the 1950 election. That legislation was tabled in the 1951 session. Similar legislation calling for the convening of a Constitutional Convention has been introduced at sessions of the General Assembly, in 1954, 1955, 1957 and 1960. None of the bills have passed which were introduced for the purpose of convening the Constitutional Convention which was approved by the voters in the November 1950 General Election. All are listed in Exhibit G, attached hereto and made a part of this bill of complaint.

41. At the 1960 session of the General Assembly, legislation calling for the convening of a Constitutional Convention passed the House of Delegates, but failed of enactment in the State Senate, after the representatives from the less populous counties, comprising a majority of the General Assembly had invoked parliamentary delays to prevent the proposed legislation from reaching a vote on the merits in the Senate.

42. A Maryland Constitutional Convention convened pursuant to Article XIV, Section 2 of the Maryland Constitution would have the power to propose amendments to the Maryland Constitution, to be submitted to the voters of the State by referenda, including amendments under which reapportionment of the General Assembly of Maryland could be achieved in a manner which would comply with Section 1 of the Fourteenth Amendment of the Constitu- [fol. 16] tion of the United States and Section 7 of the Maryland Declaration of Rights.

43. The representatives of the less populous counties in the General Assembly of Maryland consistently have refused to pass the enabling legislation, as required by Article XIV, Section 2, of the Maryland Constitution, for the purpose of summoning a Constitutional Convention and have publicly stated their apprehension that such a Convention would propose, and a majority of the voters of the State of Maryland would then approve, an amendment or amendments eliminating or revising inequitable and unconstitutional representation in the General Assembly of Maryland, which now exists by virtue of Section 2 and 5, Article III, of the Maryland Constitution.

44. The failure of the General Assembly to approve the legislation providing for a Constitutional Convention, as approved by the voters of the State of Maryland in the November 1950 general elections, violated Article XIV, Section 2 of the Maryland Constitution, as it read and was effective in 1950, and also violates Sections 1, 7 and 45 of the Declaration of Rights of Maryland.

Irreparable Injury to Petitioners

45. In view of the long continued refusal of the General Assembly, where political control is in the hands of the less populous subdivisions, as previously alleged, to either propose an amendment to the Maryland Constitution for the purpose of reapportioning the General Assembly in a manner which complies with the Fourteenth Amendment of the United States Constitution and Article 7 of the Maryland Declaration of Rights, or to permit the convening of a Constitutional Convention for that same purpose, as approved by the voters in the 1950 election, petitioners and other eligible voters of the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges and the City of Baltimore have no non-judicial recourse or relief, either through the instrumentality of the General Assembly or through the constitutional amending process provided for by the Maryland Constitution, as previously alleged.

46. Petitioners have no adequate remedy at law to [fol. 17] require the General Assembly to convene a Con-

stitutional Convention, as approved by the voters at the November 1950 general election. Petitioners are suffering irreparable injury: (a) in being denied their right under the Constitution and Declaration of Rights of Maryland to have a Constitutional Convention convened, (b) in being denied their right to have the recommendations of a Constitutional Convention, including proposals to eliminate or reform the unconstitutional system of representation which now prevails in the General Assembly, submitted to the people of the State for their approval, and (c) are suffering further irreparable injury as a consequence of the illegal discrimination in the exercise and effect of their voting rights and the taxation without adequate representation to which they and all other eligible voters of the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges and the City of Baltimore are subjected by virtue of Sections 2 and 5, Article III of the Maryland Constitution, which provisions, as previously alleged, now violate Section 1 of the Fourteenth Amendment of the Federal Constitution of the United States, and also violate the Civil Rights statutes (28 U.S.C. 1343 (3) and (4) and 42 U.S.C. 1983).

The Ultra Vires Actions Against Which Relief Is Requested

47. Article 33, Section 142(b) of the Code provides that the Board of State Canvassers, upon the basis of the certified copies of the election returns made to them by the boards of the city and county canvassers, shall determine and declare what persons have been elected to office at any State election, including election to the General Assembly of Maryland.

48. Pursuant to Article 33, Section 142(a) of the Code, the present members of the Board of State Canvassers are defendants Finan (Secretary of State), Goldstein (Comptroller), Sybert (Attorney General), Miles (Treasurer), and Young (Clerk of the Court of Appeals).

49. Defendant Finan, as Secretary of State, is required by virtue of Article 33, Section 143(a) to record the certified statements and determinations of election delivered to

[fol. 18] him by the Board of State Canvassers, to publish certified copies thereof, and to transmit a copy of the certified determinations to the Governor, defendant Tawes.

50. Defendant Tawes, as Governor of the State of Maryland, is required by Article 33, Section 143(b), in conformity with the statements and determinations made by the Board of State Canvassers and delivered to him by the Secretary of State, as alleged above, to issue commissions to the candidates elected to office in a State election.

51. Demand has been made in petitioners' behalf, upon both the Governor and the Board of State Canvassers, that they not determine, certify or commission candidates elected at the next general election to be held in November 1962, unless by such time the General Assembly shall have approved and submitted to the people by referendum an amendment to Sections 2 and 5, Article III of the Maryland Constitution, pursuant to which amendment these provisions of the State Constitution would be revised and made to conform with Section 1 of the Fourteenth Amendment of the Federal Constitution. Defendants have refused to agree to that demand, as shown by Exhibit H attached to and made a part hereof.

52. Unless restrained by this Court from doing so, defendant Tawes, as Governor of the State of Maryland, and the Board of State Canvassers, all of the members of which are defendants herein, will perform the above alleged statutory duties in the same manner as they have in the past, and will conduct, approve and issue commissions of election in the 1962 general election on the same basis as has been done in prior elections. Accordingly, defendants, unless enjoined to the contrary, will determine the election of, and issue commissions to, candidates allegedly elected to the General Assembly of Maryland on the same basis as previously has been done, i.e., on the basis of each county and legislative district's present representation in the General Assembly as fixed by Sections 2 and 5 of Article III of the Maryland Constitution, and without regard to the fact that the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges and the City of Balti-

more have not been afforded thereunder the number of [fol. 19] representatives in either branch of the General Assembly of Maryland to which they are entitled under Section 1 of the Fourteenth Amendment of the Constitution of the United States, and without regard to the fact that such unconstitutional apportionment of representation in the General Assembly illegally discriminates against the eligible voters of the above referred to areas, including these petitioners, thereby causing them irreparable injury as citizens of Maryland and of the United States, as hereinbefore alleged.

53. Defendant members of the Board of Election Supervisors of Anne Arundel County, like other local Boards of Election Supervisors of this State, are empowered, pursuant to Article 33, Section 11 of the Code, to have charge of, and conduct, all primary and general elections to the General Assembly of Maryland held within Anne Arundel County. Unless restrained by this Court from doing so, as Exhibit H attests, defendant members of the Board of Election Supervisors of Anne Arundel County and all other local Boards of Election in Maryland will conduct the 1962 general election on the same basis as they have done in previous elections, and will certify as elected to the General Assembly of Maryland only six Delegates from Anne Arundel County and one State Senator, instead of the minimum of eight and two, respectively, to which it would be entitled were representation in the General Assembly based on population.

PRAYERS FOR RELIEF

WHEREFORE, The premises considered, your petitioners pray:

(1) That the Court grant a declaratory judgment holding that Section 2, Article III of the Maryland Constitution violates Section 1 of the Fourteenth Amendment of the United States Constitution.

(2) That the Court grant a declaratory judgment, holding that Section 5, Article III of the Maryland Constitution violates Section 1 of the Fourteenth Amendment of the United States Constitution.

[fol. 20] (3) That the Court grant a declaratory judgment holding that representation in the General Assembly of Maryland, as now established by Sections 2 and 5 of Article III of the Maryland Constitution, also violates the Civil Rights statutes, i.e., 28 U.S.C. 1343 (3) and (4), and 42 U.S.C. 1983.

(4) That the Court grant a declaratory judgment holding that the General Assembly's failure to reapportion the Maryland General Assembly in accordance with a formula which reasonably reflects the present population of the various counties of Maryland and the City of Baltimore violates Section 1 of the Fourteenth Amendment of the United States Constitution, and also violates the Civil Rights statutes (28 U.S.C. 1343 (3) and (4), and 42 U.S.C. 1983), as well as Article 7 of the Declaration of Rights of Maryland.

(5) That the Court grant a declaratory judgment holding that the failure of the General Assembly of Maryland to convene a Constitutional Convention, as approved in the General Election of 1950, violates Section 2, Article XIV of the Maryland Constitution, as it read in 1950, and also violates Articles 1, 7 and 45 of the Declaration of Rights of Maryland.

(6) That the Court permanently enjoin the Board of State Canvassers and the members thereof, as identified herein, from determining, certifying, or in any other way indicating the Board's approval of the election of any candidate to the General Assembly of Maryland in any State election to be held in November 1962 or thereafter (unless such future State election be held on an at large basis), until such time as the General Assembly of Maryland shall have enacted and submitted for a referendum vote by the eligible voters of this State, an amendment or amendments to Sections 2 and 5, Article III of the Maryland Constitution, which would reapportion, on the basis of present population and in conformity with Section 1 of the Fourteenth Amendment of the United States Constitution, the representation which is allotted to the various counties and the City of Baltimore in the General Assembly of Maryland.

(7) That the Court enjoin defendant Tawes from issuing commissions of elections to any candidates for the Gen-
[fol. 21] eral Assembly of Maryland in any State election to be held in November 1962, or thereafter (unless such future election be held on an at large basis), until such time as the General Assembly of Maryland shall have taken the action requested in paragraph (6) of these prayers for relief.

(8) That the Court enjoin the Board of Election Supervisors of Anne Arundel County and the members thereof from issuing commissions to any candidates to the General Assembly of Maryland from Anne Arundel County in any State election to be held in November, 1962 or thereafter (unless such future election be held on an at large basis) until such time as the General Assembly of Maryland shall have taken the action requested in paragraph (6) of these prayers for relief.

(9) That the Court retain jurisdiction of this case until such time as the General Assembly of Maryland shall have enacted and submitted to the voters of this State for referendum vote, an amendment or amendments to Sections 2 and 5, Article III of the Maryland Constitution, which proposed amendments would provide for reapportioning, on the basis of present population and in conformity with Section 1 of the Fourteenth Amendment of the United States Constitution, and in compliance with Article 7 of the Maryland Declaration of Rights, the representation allotted the counties and the City of Baltimore in the General Assembly of Maryland.

(10) That the defendants pay the cost of this suit.

(11) That the Court grant such other and further relief as to it may seem just and proper.

Maryland Population Figures As Compiled by the U. S. Department of Commerce, Bureau of Census—1960

	1960	1950
Allegany	83,831	89,556
Anne Arundel	206,095	117,392
Baltimore City	921,363	949,708
Baltimore County	490,201	270,273
Calvert	15,661	12,100
Caroline	19,376	18,284
Carroll	52,649	44,907
Cecil	48,346	33,356
Charles	32,575	23,415
Dorchester	29,597	27,815
Frederick	71,985	62,287
Garrett	20,253	21,259
Harford	76,774	51,782
Howard	35,768	23,119
Kent	15,317	13,677
Montgomery	338,675	164,401
Prince Georges	356,061	194,182
Queen Anne's	16,451	14,579
St. Mary's	38,803	29,111
Somerset	19,375	20,745
Talbot	21,519	19,428
Washington	90,185	78,886
Wicomico	48,744	39,641
Worcester	23,395	23,148

[fol. 23]

EXHIBIT B TO COMPLAINT

See Opposite ☞

State of Maryland
BOARD OF REVENUE ESTIMATES
Annapolis

	Income Tax—Resident Individuals		Retail Sales and Use Taxes*	Motor Vehicle Registrations and Fines		Motor Vehicle Fuel Tax		Tax on Recordation of Instruments in Writing		Corporation Franchise Tax	
	Total Receipts (Less Refunds)	Distributions to Baltimore City, Counties and Towns	Total Receipts (Less Refunds)	Total Receipts (Less Refunds)	Distributions to Baltimore City, Counties and Towns	Total Receipts (Less Refunds)	Distributions to Baltimore City, Counties and Towns	Total Receipts (Less Refunds)	Distributions to Baltimore City, Counties and Towns	Total Receipts (Less Refunds)	Distribution to Baltimore City, Counties and Towns
Baltimore City	$20,707,378.67	$ 5,967,421.40	$22,510,272.41		$ 3,445,101.41		$15,225,168.19	$ 415,575.11	$ 412,281.26	$ 305,909.62	$ 152,897
Allegany County	1,343,543.05	354,770.56	1,397,117.87	N	103,051.24	N	455,421.27	20,166.42	20,166.42	9,830.00	4,915
Anne Arundel County	3,556,964.50	860,319.53	2,237,551.42	o	136,454.27	o	603,041.52	120,996.17	120,994.04	15,260.00	7,580
Baltimore County	14,206,140.59	3,204,673.04	6,794,536.05		261,475.04		1,155,554.26	279,907.50	279,907.50	39,125.00	19,552
Calvert County	137,194.77	33,853.38	150,965.75		37,964.37		167,778.52	6,140.93	6,140.93	1,085.00	542
Caroline County	208,922.61	48,762.14	190,980.76	B	77,437.87	B	342,226.41	4,103.17	4,103.17	1,965.00	982
Carroll County	769,777.46	188,740.47	587,019.44	r	125,759.12	r	555,775.74	19,918.74	19,918.74	4,690.00	2,345
Cecil County	629,811.24	153,867.25	507,399.69	e	71,279.36	e	315,009.67	16,196.01	16,196.01	4,025.06	2,012
Charles County	378,145.29	88,705.70	351,675.90	a	60,035.28	a	265,317.94	12,489.81	12,489.81	3,340.00	1,670
Dorchester County	359,464.14	83,770.21	364,185.29	k	86,594.55	k	282,603.13	7,211.57	7,211.57	3,545.00	1,762
Frederick County	1,070,408.45	248,032.48	1,003,980.11	d	168,311.10	d	743,828.58	24,608.71	24,562.22	9,600.00	4,800
Garrett County	125,245.34	33,699.15	199,797.07	o	109,778.18	o	485,150.12	5,379.65	5,369.20	915.00	457
Harford County	1,265,717.91	298,843.92	821,185.95	w	100,204.45	w	442,840.27	30,957.58	30,957.58	6,020.00	2,970
Howard County	709,235.68	169,184.02	333,541.83	n	52,981.45	n	234,144.49	29,216.62	29,216.62	3,045.71	1,522
Kent County	210,261.85	56,059.42	236,363.39		46,816.50		206,899.32	6,133.62	6,133.62	2,775.00	1,387
Montgomery County	12,210,381.60	2,737,479.40	5,104,998.63		176,811.30		781,394.09	804,736.19	804,394.23	45,844.00	22,862
Prince George's County	7,674,798.11	1,691,980.02	3,917,923.84	A	159,474.17	A	704,774.91	271,760.07	271,760.07	27,190.00	13,577
Queen Anne's County	192,724.42	46,036.07	178,846.16	v	64,722.33	v	286,031.72	7,743.42	7,688.04	1,415.00	707
St. Mary's County	297,034.94	65,550.72	348,988.81	a	52,675.61	a	232,792.87	13,095.41	13,095.41	2,260.00	1,130
Somerset County	136,144.48	36,002.34	148,073.60	i	47,694.12	i	210,777.82	2,978.72	2,977.68	1,710.00	855
Talbot County	456,846.85	123,374.59	445,559.08	l	49,675.99	l	219,536.06	9,972.41	9,972.41	4,430.00	2,177
Washington County	1,726,387.22	412,553.24	1,592,519.08	a	125,566.04	a	554,922.44	29,742.26	29,742.26	14,980.00	7,485
Wicomico County	746,675.74	170,919.96	1,018,135.06	b	104,147.94	b	460,268.00	18,977.70	18,782.81	10,840.00	5,420
Worcester County	260,851.71	68,885.82	471,275.26	l	77,824.04	l	343,933.00	14,281.04	14,281.04	4,745.00	2,355
District of Columbia	—	—	2,170,663.90	e	—	e	—	—	—	—	—
All Other Out of State	—	—	2,227,984.74		—		—	—	—	—	—
Other	211,170.70	—	492,316.46		—		—	—	—	—	—
Total	$89,591,227.32	$17,143,484.83	$55,803,857.55	$20,606,769.28	$ 5,741,835.65	$50,974,854.12	$25,375,280.34	$ 2,172,288.83	$ 2,168,342.64	$ 524,544.33	$ 261,877

* This source of revenue is not shared with the Political Subdivisions.

JULY 5, 1960.

	Recordation of nts in Writing	Corporation Franchise Tax		Alcoholic Beverage Excise Tax (Distilled Spirits)		Business Licenses		Admissions Tax	
	Distributions to Baltimore City, Counties and Towns	Total Receipts (Less Refunds)	Distributions to Baltimore City, Counties and Towns	Total Receipts	Distributions to Baltimore City, Counties and Towns	Total Receipts (Less Refunds)	Distributions to Baltimore City, Counties and Towns	Total Receipts (Less Refunds)	Distributions to Baltimore City, Counties and Towns
1	$ 412,281.26	$ 305,909.62	$ 152,807.31		$ 1,023,000.01	$ 892,237.83	$ 816,842.06	$ 147,324.02	$ 128,286.89
2	20,166.42	9,830.00	4,915.00	N	61,137.95	75,354.18	69,206.34	8,208.68	7,106.62
7	120,994.04	15,260.00	7,580.00	o	133,284.87	115,059.75	103,874.37	116,438.61	101,558.46
0	279,907.50	39,125.00	19,552.50		256,795.95	215,096.13	201,492.66	41,160.61	36,413.33
3	6,140.93	1,085.00	542.50		12,817.00	12,817.16	10,883.44	8,939.69	7,910.88
7	4,103.17	1,965.00	982.50	B	6,454.98	17,810.14	16,343.94	617.87	541.22
4	19,918.74	4,690.00	2,345.00	r	8,552.99	39,667.37	36,672.63	2,180.13	1,898.48
1	16,196.01	4,025.00	2,012.50	e	29,280.15	35,412.49	32,063.40	2,077.99	1,814.44
1	12,489.81	3,340.00	1,670.00	a	33,448.21	28,707.86	24,605.09	27,868.37	24,489.96
7	7,211.57	3,545.00	1,762.50	k	10,226.53	30,905.91	25,522.92	1,322.81	1,154.23
1	24,562.22	9,600.00	4,800.00	d	39,595.58	62,988.14	58,303.72	5,556.01	4,847.89
5	5,369.20	915.00	457.50	o	—	16,930.64	15,487.64	949.80	835.78
3	30,957.58	6,020.00	2,970.00	w	17,349.54	50,707.21	46,795.93	7,011.04	6,135.90
2	29,216.62	3,045.71	1,522.85	n	24,133.06	18,798.82	17,360.72	14,870.56	13,396.01
2	6,133.62	2,775.00	1,387.50		8,133.30	17,629.11	16,044.19	1,602.82	1,420.33
9	804,394.23	45,844.00	22,862.00		120,421.86	144,131.44	135,400.90	25,424.50	22,273.60
4	271,760.07	27,190.00	13,577.50	A	182,638.81	138,456.61	128,445.46	55,616.27	48,512.70
2	7,688.04	1,415.00	707.50	v	15,052.83	17,874.02	14,069.53	464.40	407.34
1	13,095.41	2,260.00	1,130.00	s	30,348.57	27,403.05	22,680.84	138,945.80	121,413.25
2	2,977.68	1,710.00	855.00	i	8,643.41	17,806.56	13,629.13	590.64	517.47
	9,972.41	4,430.00	2,177.50	l	29,416.05	29,017.81	24,872.41	1,572.07	1,377.62
6	29,742.26	14,980.00	7,485.00	a	56,144.41	88,029.05	80,829.97	11,870.56	10,157.56
4	18,782.81	10,840.00	5,420.00	b	20,853.79	54,950.35	50,572.93	3,563.72	3,116.93
1	14,281.04	4,745.00	2,355.00	l	19,395.39	31,710.94	28,591.79	11,981.30	10,824.12
	—	—	—	e	—	—	—	—	—
	—	—	—		—	—	—	—	—
	—	—	—		—	—	—	—	—
	$ 2,168,342.64	$ 524,544.33	$ 261,877.16		$ 6,470,300.02	$ 2,147,125.67	$ 2,179,493.57	$ 1,990,592.21	$ 636,158.27	$ 556,411.01

[fol. 24]

EXHIBIT C TO COMPLAINT

See Opposite ☞

Comparison of Allocation of Motor Vehicle Registration to Maryland Political Subdivisions With Population, Road Mileage and Motor Vehicle Registrations

County	Area		1960 Pop.		County Road Mil'g		Motor Vehicle Regis.		Present Allocation of 20% Share	
	Sq. Mi	Pct.	x1000	Pct.	Miles	Pct.	Number	Pct.	Amount	Pct.
Allegany	428	3.96	83.8	2.7	667.15	4.5	30,387	2.82	558,472.51	4.5
Anne Arundel	458	4.34	206.1	6.7	883.40	6.0	64,503	6.00	739,495.79	5.9
Baltimore	638	6.04	490.2	15.9	1,692.78	11.5	178,431	16.58	1,417,029.30	11.4
Calvert	244	2.31	15.7	0.5	245.78	1.7	5,337	.50	205,742.89	1.7
Caroline	325	3.07	19.4	0.6	501.33	3.4	9,995	.93	419,664.28	3.4
Carroll	456	4.32	62.6	1.7	814.16	5.5	23,561	2.19	681,534.86	5.5
Cecil	386	3.65	48.3	1.6	461.46	3.1	16,748	1.56	386,289.03	3.1
Charles	502	4.75	32.6	1.1	326.73	2.2	11,084	1.03	325,353.22	2.6
Dorchester	688	6.51	29.6	1.0	560.61	3.8	12,274	1.14	469,287.68	3.8
Frederick	670	6.34	72.0	2.3	1,089.64	7.4	28,568	2.66	912,139.68	7.3
Garrett	668	6.32	20.3	0.7	710.70	4.8	7,747	.72	594,928.30	4.8
Harford	475	4.50	76.8	2.5	648.72	4.4	27,282	2.54	543,044.72	4.4
Howard	251	2.37	35.8	1.2	343.00	2.3	13,618	1.27	287,125.94	2.3
Kent	308	2.91	15.3	0.5	240.21	1.6	6,943	.65	253,716.82	2.0
Montgomery	506	4.79	338.7	11.0	1,144.67	7.8	131,318	12.21	958,205.39	7.7
Prince Georges	496	4.69	356.1	11.6	1,032.43	7.0	126,770	11.78	864,249.08	6.9
Queen Anne's	408	3.87	16.5	0.5	419.01	2.9	7,105	.66	350,754.05	2.8
St. Mary's	420	3.98	38.8	1.3	341.02	2.3	9,934	.92	285,468.48	2.3
Somerset	378	3.57	19.4	0.6	308.77	2.1	6,921	.64	258,471.94	2.1
Talbot	331	3.13	21.5	0.7	321.60	2.2	10,264	.95	269,211.97	2.2
Washington	471	4.46	90.2	2.9	812.91	5.5	36,593	3.40	680,488.48	5.5
Wicomico	395	3.73	48.7	1.6	674.25	4.6	21,782	2.02	564,415.94	4.5
Worcester	589	5.58	23.4	0.7	503.83	3.5	10,904	1.01	421,757.04	3.4
Baltimore City	86	.81	921.4	30.0			277,797	25.82		
Total			3,083.0		14,744.16				12,446,846.39	

[fol. 25]

EXHIBIT D TO COMPLAINT

See Opposite ☞

STATUS OF REPRESENTATION OF COUNTIES AND CITY OF BALTIMORE IN THE GENERAL ASSEMBLY

County	1960 Population	Delegates	Each Represents	Deviation From Mean (25,065)	Percent of Deviation	Percent of Fair Value of Vote for: Delegate	Senator	Population Growth 40–50	50–60
Allegany	83,831	6	13,972	11,093	44	179	121	3.0	−6.0
Anne Arundel	206,095	6	34,349	−9,330	−37	73	51	71.7	74.5
Baltimore	490,201	6	81,700	−56,635	−225	30	22	73.4	81.5
Calvert	15,661	2	7,831	17,284	69	321	680	15.4	34.5
Caroline	19,376	2	9,688	15,077	60	258	547	3.9	6.0
Carroll	52,649	4	13,162	11,903	47	192	220	15.0	17.1
Cecil	48,346	3	16,288	8,777	35	156	218	44.8	26.3
Charles	32,575	2	16,093	7,850	31	153	329	32.9	37.6
Dorchester	29,597	4	7,399	17,666	71	338	358	−0.7	.6.5
Frederick	71,985	6	11,997	13,088	52	208	147	8.7	15.5
Garrett	20,253	3	6,751	18,314	73	368	522	−3.3	−4.7
Harford	76,774	4	19,193	5,872	23	131	138	47.7	48.3
Howard	35,768	2	17,884	7,181	29	139	296	34.6	55.0
Kent	15,317	2	7,658	17,407	69	325	692	1.6	12.4
Montgomery	338,675	6	56,446	−31,381	−125	44	41	95.9	106.0
Prince Georges	356,061	6	59,343	−34,278	−138	42	30	117.0	83.5
Q. Anne's	16,451	2	8,225	16,840	67	305	642	0.7	7.7
St. Mary's	38,803	2	19,401	5,664	23	129	273	99.0	33.3
Somerset	19,375	3	6,458	18,612	74	385	547	−1.0	−6.8
Talbot	21,519	3	7,173	17,892	71	348	493	3.4	10.8
Washington	90,185	6	15,014	10,051	40	167	119	14.6	13.1
Wicomico	48,744	4	12,186	12,879	51	205	218	14.8	22.9
Worcester	23,395	3	7,798	17,267	69	321	452	9.0	1.9
Baltimore City	921,363	36	25,593	−527	−3	98	69	10.5	−2.8
State	3,082,999	123	25,065					28.6	31.1

(29 Senators: one for each 106,310 population)

[fol. 26]

Exhibit E to Complaint

Reapportionment Legislation Introduced in the General Assembly of Maryland, 1951 through 1959*

1951

1. S.B. 403, introduced on March 20, 1951, and calling for a new legislative district for Baltimore City. Referred to the Senate Committee on Judicial Proceedings. Favorable report rejected by the Senate on March 26, 1951.

1952

2. No reapportionment bills were introduced at this session of the General Assembly.

1953

3. H.B. 845, introduced on March 26, 1953, and to provide for the total House membership for Baltimore City. This bill died in the House Judiciary Committee.

1954

4. House Resolution 31, introduced on February 22, 1954, and calling for the Board of Public Works to name a commission to study reapportionment. The resolution was adopted on February 26, 1954.

5. H.B. 69, introduced on February 10, 1954, and providing that the Montgomery County representation in the House of Delegates be increased from 6 to 9 members. This bill died in the House Rules Committee.

6. H.B. 75, introduced on February 10, 1954. The bill called for reapportionment of the Senate, increasing the membership thereof from 29 to 40 members, and also provided for a change in the formula for representation in the House of Delegates. This bill died in the House Judiciary Committee.

[fol. 27] 1955

7. No reapportionment bills were introduced at this session of the General Assembly.

1956

8. No reapportionment bills were introduced at this session of the General Assembly.

1957

9. H.B. 328, introduced on February 4, 1957, and to provide for a new method of determining membership in the House of Delegates. The bill died in the House Judiciary Committee.

1958

10. H.B. 161, introduced on February 24, 1958, and to provide for reapportionment of the Senate. The bill died in the House Judiciary Committee.

1959

11. H.B. 50, introduced on January 20, 1959, and calling for the creation of additional legislative districts in the larger counties. The bill died in the House Judiciary Committee.

12. H.B. 243, introduced on February 9, 1959, and to provide for seven legislative districts for the City of Baltimore. It died in the House Judiciary Committee.

13. S.D. 131, introduced on January 23, 1959. The proposed legislation provided for legislative districts in the counties. The bill died in the Senate Judicial Proceedings Committee.

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* The above stated information was provided by the Office of Research of the Legislative Council of the State of Maryland.

[fol. 28]

EXHIBIT F TO COMPLAINT

FINAL REPORT OF THE COMMISSION ON MORE EQUITABLE REPRESENTATION IN THE GENERAL ASSEMBLY OF MARYLAND

December 31, 1959

Address correspondence to:
Department of Legislative Reference,
Room 311, City Hall,
Baltimore 2, Maryland.

Honorable J. Millard Tawes,
Executives Offices,
Annapolis, Maryland.

DEAR GOVERNOR:

The 1958 Democratic State Platform contained the following statement with relation to providing More Equitable Representation in the General Assembly of Maryland, namely:

> The provisions in the Maryland Constitution for representation in the General Assembly of Baltimore City and the twenty-three counties have long been obsolete. The recent large increases in the population of Baltimore, Montgomery, Prince George's and Anne Arundel Counties, among others, have made it clear that, in addition to Baltimore City's claim for more equitable representation in the General Assembly, a general revision of the basis of representation should no longer be postponed. We pledge the next Democratic Governor of Maryland to appoint a Commission of outstanding and representative citizens of the State to make a comprehensive study of the subject, and to devise a plan for submission to the General Assembly, and to the people through a Constitutional amendment designed to provide more equitable representation in [fol. 29] the General Assembly for Baltimore City and for the counties of the State.

In accordance with the foregoing pledge, you appointed a "Commission on More Equitable Representation in the General Assembly of Maryland" in February 1959, and after studying this always difficult problem to the best of its ability, the Commission so appointed by you, herewith submits its final report, which Final Report differs in some particulars from the Report previously submitted under date of October 10, 1959.

It might be said at the outset that the problem of proper representation in State legislative bodies is not limited to Maryland but is of general concern throughout the Country. Our investigation shows that between 1941 and 1950 twenty-six States reapportioned their Legislatures, and that since 1950 fifteen States have reapportioned. Some States require reapportionment at stated intervals, in thirty-seven States the Legislature has the power to reapportion, and a few States give some ex-officio agencies or permanent Commissions, the authority to act if the Legislature fails to act. The plans adopted vary widely and are too numerous to set out in this report. Furthermore, we do not believe that a consideration of these plans would be particularly helpful, as any practical solution of this problem in Maryland must necessarily take into consideration the provisions of our own Constitution and the traditional method of representation established by those provisions, but we deemed it proper to point out that the great majority of the States have found the problem both difficult and continuing.

Maryland Constitutional Provisions

Representation in the Legislature was provided for by Sections 1 to 5 of Article III of the Constitution of 1867, and except as hereinafter noted, these provisions are still in effect.

Section 1 provided that the Legislature should consist of two branches, a Senate and a House of Delegates, and should be styled the General Assembly of Maryland.

[fol. 30] Section 2 provided that each County, and each of the three Legislative Districts into which Baltimore City was then divided, should be entitled to one Senator.

Section 3 provided specifically for the number of members of the House of Delegates to which each County and each Legislative District should be entitled until the taking of the 1870 National Census, and under this Section the 21 Counties then in existence had 68 members and Baltimore City had 18.

Section 4 provided that after the 1870 Census, each County, based on its population, should have the following representation.

18,000 or less	2 delegates
Over 18,000 and less than 28,000	3 delegates
28,000 and less than 40,000	4 delegates
40,000 and less than 55,000	5 delegates
55,000 and upwards	6 delegates and no more

The Section also provided that each Legislative District in Baltimore City should be entitled to the number of Delegates to which the largest County shall be entitled, and it gave the General Assembly authority to change the boundaries of the City Districts from time to time so as to make them approximately equal in population.

Section 5 of Article III provided that after each Federal Census the Governor of Maryland should apportion the membership of the House of Delegates in accordance with the standards set up in Section 4.

In 1900 the Constitution was amended to give Baltimore City four Legislative Districts, and in 1922 it was further amended to give Baltimore City six Legislative Districts, so that the City now has six State Senators and thirty-six members of the House of Delegates, which is just twice the representation it had under the original Constitution of 1867.

In 1950, as the result of a suggestion made by a Committee on More Equitable Representation appointed by Governor William Preston Lane, Jr., a Constitutional amendment was adopted which froze representation in the House of Delegates on the basis of the representation established under the Federal Census of 1940.

The Constitution of 1867 provided a minimum of 2 Dele- [fol. 31] gates for each County, with increases up to 6, based on gains in population up to 55,000, but made no

provision for any increases in representation after a County reached 55,000. The obvious purpose of the 1950 amendment was to prevent the smaller Counties from gaining increased representation at the expense of the larger Counties, as under the Constitution a County was entitled to a maximum of six Delegates when its population reached 55,000, but acquired no further representation no matter how large it might become.

The following table shows the population of each County and of Baltimore City under the Federal Census of 1870, 1940 and 1950, and the State Department of Health estimates of these populations for 1959, together with the number of Delegates to which each County and the City were entitled under the 1870 and 1940 Census. The representation under the 1940 Census is the present representation in the House of Delegates.

There is also attached to this Report a table showing the population figures for each County and for Baltimore City from 1870 to 1950, and the State Department of Health estimates of these populations for 1959 and 1960.

[fol. 32]

See Opposite ☞

TABLE

FEDERAL CENSUS 1870, 1940 AND 1950,
STATE DEPARTMENT OF HEALTH ESTIMATED 1959 POPULATION

	Population of 1870	Number of Delegates	Population of 1940	Number of Delegates	Population of 1950	Population of 1959 (Estimated)
Allegany	33,536	4	86,973	6	89,556	82,000
Anne Arundel	24,457	3	68,375	6	117,392	194,000
Baltimore	63,142	6	155,825	6	270,273	447,000
Calvert	9,865	2	10,484	2	12,100	14,700
Caroline	12,101	2	17,549	2	18,234	19,400
Carroll	28,619	4	39,054	4	44,907	54,500
Cecil	25,874	3	26,407	3	33,356	48,500
Charles	15,738	2	17,612	2	23,415	31,200
Dorchester	19,485	3	28,006	4	27,815	28,200
Frederick	47,572	5	57,312	6	62,287	70,000
Garrett (founded 1872) 1880	12,175	2	21,981	3	21,259	20,000
Harford	22,605	3	35,000	4	51,782	70,800
Howard	14,150	2	17,175	2	23,119	30,500
Kent	17,102	2	13,465	2	13,677	15,800
Montgomery	20,563	3	83,912	6	164,401	312,000
Prince George's	21,138	3	89,490	6	194,182	350,000
Queen Anne's	16,171	2	14,476	2	14,579	15,400
St. Mary's	14,944	2	14,626	2	29,111	39,700
Somerset	18,190	3	20,965	3	20,745	21,300
Talbot	16,137	2	18,784	3	19,428	20,200
Washington	34,712	4	68,838	6	78,886	90,000
Wicomico	15,802	2	34,530	4	39,641	50,200
Worcester	16,419	2	21,245	3	23,148	25,000
Total Counties	513,295	66	962,144	87	1,393,293	2,050,400
Baltimore City	267,354	18	859,100	36	949,708	989,000
State of Maryland	780,649	84	1,821,244	123	2,343,001	3,039,400

[fol. 33]

Present Inequities in Representation

It is obvious from the figures in the foregoing table that representation in the House of Delegates is grossly inequitable, particularly in the cases of the four largest Counties, Baltimore, Prince George's, Montgomery and Anne Arundel.

For example, according to the estimates made by the State Health Department, Baltimore County, with six Delegates, had a 1959 population of 447,000, which is one Delegate for each 74,500 people. Prince George's County, with six Delegates, had a 1959 population of 350,000, which is one Delegate for each 58,333 people. Montgomery County, with six Delegates, had a 1959 population of 312,000, which is one Delegate for each 52,000 people; and Anne Arundel County, with six Delegates, had a 1959 population of 194,000, which is one Delegate for each 32,333 people.

On the other hand, Calvert County with two Delegates, had a 1959 population of 14,700, which is one Delegate for each 7,350 people. Queen Anne's County, with two Delegates, had a 1959 population of 15,400, which is one Delegate for each 7,700 people. Kent County, with two Delegates, had a 1959 population of 15,800, which is one Delegate for each 7,900 people. Dorchester County, with four Delegates, had a 1959 population of 28,200, which is one Delegate for each 7,050 people. And there are numerous other examples of unequal representation, some of which will be set out later in this Report.

Suggested Plan for More Equitable Representation in the Maryland Legislature

Preliminary Discussion

For the reasons hereinafter set forth, the Commission has agreed on the following matters:

1. No change in the representation in the State Senate is recommended. The present representation of one State Senator from each County and of one State Senator for each of the six Districts in Baltimore City, is based on Senate representation from localities, rather than on a

[fol. 34] population basis and as the Senate of the United States has representation on a similar basis, and such representation is traditional in Maryland, the Commission believes that it would be inadvisable to recommend any change so far as the State Senate is concerned.

2. No immediate change is recommended with regard to the representation of Baltimore City in the House of Delegates. On the basis of the City's present population, as compared to the total population of the Counties, the City of Baltimore as a whole now has a larger percentage of representation in the House of Delegates than it had in 1870, under the provisions of the Constitution of 1867. The 1870 census gave the City a population of 267,354, while the Counties then had a total population of 513,295, making a total State population of 780,649. Of this total, Baltimore City had approximately 34.25 per cent, and the counties had approximately 65.75 per cent. The City then had eighteen members of the House of Delegates, while the Counties had sixty-six members, so that the City had approximately 21.5 per cent of the House members, and approximately 34.25 per cent of the State's population.

The 1959 estimated population of the City is 989,000 and the 1959 estimated total population in the Counties is 2,050,400, making a total State population of 3,039,400. The City's percentage of this total is approximately 32.35 per cent, which is two per cent less than the City had in 1870. On the other hand, the City as a result of two constitutional amendments, now has thirty-six members of the House of Delegates as against eighty-seven County members, and the City's percentage of the total House membership of 123 is slightly over twenty-nine per cent. It thus appears that with two per cent less of the population, the City has 7½% more of the representation in the House than it had in 1870, and even if all of the additional eighteen members hereinafter recommended come from the Counties, the City will still have 25.5% of the total membership, and this exceeds the 21.5% which it had in 1870. Furthermore, the County population as a whole is increasing more rapidly than the City population. The State Health Department estimates a total State gain of about 75,000 in 1960 over

[fol. 35] 1959, and of this gain only 2,500 is credited to the City, while the County gain will be over 70,000.

However, there are inequities among the six Districts in the City. The Legislature has the authority to correct this situation under the present Constitution, and we recommend that the representatives of the City in the Legislature submit a plan to correct the present inequities in the City Districts, and if they do so, and the plan is approved by the Legislature, we believe any District which acquires the necessary population in the future should secure the same additional representation recommended for the Counties.

The Commission has decided that it would be impractical to suggest any decrease in the present representation of any County in the House of Delegates. If any decreases were recommended, the smaller Counties would necessarily be affected. There are seven Counties with two Delegates, five Counties with three Delegates, and four Counties with four Delegates, making a total of sixteen. Nearly all of these would lose representation under any plan providing for decreases of representation based on a population basis, and it is also probable that some of the seven Counties which now have the maximum of six Delegates would also lose representation. A constitutional amendment requires a three-fifths vote of both Houses of the Legislature, and this means eighteen votes in the State Senate, so that twelve of the twenty-nine State Senators can prevent the approval of any Constitutional amendment. The Commission believes that it would be impossible to secure eighteen affirmative votes in the Senate even if as many as twelve of the Counties were going to lose any of their present representation, and that any logical plan calling for a decrease in representation would involve at least twelve Counties and probably more. In this connection we also wish to mention that representation in the House of Delegates, based solely on a population basis, would require decreases in membership for more than half of the Counties, which we think impossible of accomplishment, or would result in a major increase in the membership of the House of Delegates, which we do not deem advisable.

It should also be noted that there is a great diversity of [fol. 36] interests in Maryland, including farming, truck farming, tobacco growing, horse breeding and cattle raising, timber, poultry, oysters and other seafoods, canning, coal mining, orchards, industrial plants, and the large industrial and mercantile enterprises of Baltimore City, together with the City's port and shipping interests. These interests are located in various sections of the State, there is often a considerable difference even in adjoining Counties, and it has been traditional in Maryland to have each County and Baltimore City represented in the Legislature so that these diversified interests may all be properly considered in enacting the laws of the State.

Proposed Plan for More Equitable Representation in the House of Delegates

If the above tentative conclusions of the Commission are approved, the only way in which any improvement can be made is to give increased representation to the larger counties, and, under certain circumstances, to some of the Baltimore City Districts, and in considering this matter, attention must be given to the maximum number of members that should compose the House of Delegates.

There are now 123 members, and it is believed that there are only fifteen States which have a larger membership. Furthermore, the physical size of the present House of Delegates chamber in the State House must be considered, because this chamber will not accommodate very many more members.

The Commission suggests that the maximum number of members be limited to 141, it being thought desirable to have an uneven number to avoid tie votes, and this would mean a total increase of 18 members.

The four largest counties are Baltimore, with an estimated 1959 population of 447,000; Prince George's with an estimated 1959 population of 350,000; Montgomery with an estimated 1959 population of 312,000; and Anne Arundel County with an estimated 1959 population of 194,000. All of these counties now have the present maximum representation of six Delegates each, and it is obvious that if the

increase in the membership of the House of Delegates is to be limited to 18 additional members, such increase, if [Vol. 37] granted, must be based on very substantial increases in population. The Commission suggests that no County and no City District have more than six Delegates until its population reaches 200,000, and that thereafter an increase of 100,000 be required for each additional Delegate up to a maximum of ten, and it further suggests that this plan apply to the Baltimore City Districts only after the populations of these Districts have been made approximately equal by the Legislature.

This suggestion would give increased representation to the above four largest Counties after the 1960 Federal Census is completed, the City of Baltimore could secure additional Delegates at a later date, and it is believed that consideration should also be given to granting increased representation to some smaller Counties whose populations are growing more rapidly than are those of the remaining Counties.

In accordance with the foregoing views, the following plan is proposed:

PLAN RECOMMENDED

Any County now having two Delegates shall be entitled to three Delegates when its population reaches 50,000.

Any County which has or acquires three Delegates shall be entitled to four Delegates when its population reaches 75,000.

Any County which has or acquires four Delegates shall be entitled to five Delegates when its population reaches 100,000.

Any County which acquires five Delegates (no County now has this number) shall be entitled to six Delegates when its population reaches 150,000.

Any County which has or acquires six Delegates shall be entitled to seven Delegates when its population reaches 200,000.

Any County which becomes entitled to seven Delegates shall be entitled to eight Delegates when its population reaches 300,000.

Any County which becomes entitled to eight Delegates shall be entitled to nine Delegates when its population reaches 400,000.

[fol. 38] Any County which becomes entitled to nine Delegates shall be entitled to ten Delegates when its population exceeds 500,000.

After the City of Baltimore has been re-districted so that the population of each District will be about the same, any District acquiring a population of 200,000 shall be entitled to seven Delegates, any District acquiring a population of 300,000 shall be entitled to eight Delegates, any District acquiring a population of 400,000 shall be entitled to nine Delegates, and any District whose population exceeds 500,000 shall be entitled to ten Delegates.

No County nor District shall have more than ten Delegates.

The population of each County and District shall be determined by the Federal Census and after each such census has been published, the Governor shall, within thirty days after such publication, declare by proclamation the number of Delegates to which each County and District is entitled as determined by such census under the above plan. If any Federal Census does not give the population by Districts in Baltimore City, the Governor shall have the power to determine the population of each District, and in doing so, the Governor shall use the Census figures for the City Wards and blocks, and the Governor's determination of the population of each District shall be final.

The maximum membership of the House of Delegates shall be 141, and when that number has been reached no further members shall be added. Should the number to be added under any future census exceed this maximum, the number required to achieve said maximum shall be given to the Counties and Districts whose population growth since the previous census has been the largest.

COMMENTS ON ABOVE PLAN

According to the estimates of the State Health Department, the 1960 population of Baltimore County will be 465,000, that of Prince George's will be 370,000, that of

Montgomery County will be 325,000, and that of Anne Arundel County will be 205,000. If the 1960 Federal Census shows that these figures are approximately correct, Baltimore County, under the above plan, would get nine Delegates, an increase of three; Prince George's and Mont- [fol. 39] gomery Counties would each get eight Delegates, an increase of four; and Anne Arundel County would get seven Delegates, an increase of one. This would make a total increase of eight Delegates under the 1960 census, and adding this increase to the present membership of 123 in the House of Delegates, would give a total membership of 131.

Based on the growth of the above four Counties during the past twenty years, it seems quite probable that under the 1970 census Baltimore County will become entitled to the maximum of ten Delegates, a gain of one, that Prince George's County will also become entitled to the maximum of ten Delegates, a gain of two, that Montgomery County will become entitled to nine Delegates, a gain of one, and that Anne Arundel County will become entitled to eight Delegates, a gain of one, making six additional Delegates, and bringing the total membership of the House to 137.

In addition, while the population of Baltimore City is increasing at a much less rapid rate than that of many of the Counties, it seems likely that some of the City Districts would become entitled to additional representation by 1970, and certainly some would by 1980.

There are also five other Counties whose population gains in recent years and their locations near Baltimore or Washington, indicate that they may become entitled to additional representation in 1970 or in 1980 under the above plan, and these Counties are Cecil, Charles, Harford, Howard and St. Mary's.

Under the 1950 census, Cecil County had a population of 33,356 and its estimated 1960 population is 49,500. Cecil County now has three members of the House of Delegates, and under the proposed plan it would be entitled to an additional Delegate when its population reached 75,000. It is possible that this figure would be reached by 1970, and it is certainly probable that it would be reached by 1980.

Under the 1950 Census, Charles County had a population of 23,415, and its estimated population for 1960 is 32,000. The County now has two Delegates, and would be entitled to a third when its population reaches 50,000 under the proposed plan. The County is near Washington, and we are advised that its population has been growing quite rapidly [fol. 40] in the last few years, and it is certainly possible that it would obtain an additional Delegate in either 1970 or 1980.

Harford County's population under the 1950 Census was 51,782, and its estimated population for 1960 is 71,000. Harford County now has four Delegates, and it would become entitled under the proposed plan to an additional Delegate when its population reached 100,000, and it is possible that this figure would be reached by 1970, and it will certainly be reached by 1980.

Howard County, under the 1950 Census, had a population of 23,119 and its estimated population for 1960 is 32,000. This County now has two Delegates, and would become entitled under the plan to an additional Delegate when its population reaches 50,000, and as the County adjoins Baltimore City, it may reach 50,000 by 1970, and would certainly reach that figure by 1980.

St. Mary's County, under the 1950 Census, had a population of 29,111, and its estimated 1960 population is 40,500. The County now has only two Delegates. It would become entitled to a third Delegate, under the plan, when its population reaches 50,000, and it seems rather certain that the County will reach that figure by 1970, as it will only need a gain of 9,500.

If the figures heretofore given are substantially correct, it seems probable that the maximum House membership of 141 would not be reached until 1980, and on this basis, the proposed plan would take care of matters until the 1990 Census, which is a period of thirty years from the present.

It would, of course, be desirable to devise a plan which would solve the problem for all time to come, but the failure of our forefathers to accomplish this in the Constitution of 1867, and the difficulties which have arisen from their efforts to do so, the great changes in population in various

parts of the State which have occurred in recent years, and the inability of human beings to foresee the future, render this impossible.

Our present problem stems largely from the population yardsticks set out in the Constitution of 1867, plus the failure to hold a Constitutional convention every twenty years as provided for by that Constitution. Any group which attempts to deal with the problem is at once faced [fol. 41] with the established representation now given Baltimore City and each County, and with the practical difficulty of getting a sufficient number of the members of the Legislature to vote for a proposal which in any way lessens the political importance of their respective political units. The result is that a compromise must be sought which will make at least some improvement in the present situation without decreasing to an unreasonable extent the political stature and importance of any area of the State.

We express the hope that the proposed plan accomplishes these ends and that it will meet with the approval of the fairminded ladies and gentlemen who compose the Maryland Legislature.

The Report of the Commission is unanimous, except that Senator Harry R. Hughes and Delegate John Hanson Mitchell would prefer that a County now having two Delegates shall be entitled to three Delegates when its population reaches 40,000, rather than the 50,000 figure agreed to by the majority of the Commission.

Senator William S. James would prefer a permanent reapportionment plan with maximum and minimum representation and with the balance of representation to flow with the population.

Respectfully submitted,

ALGER Y. BARBEE,
WILSON K. BARNES,
JOSEPH BERNSTEIN,
RICHARD F. CLEVELAND,
J. EDGAR HARVEY,
HARRY R. HUGHES,
WILLIAM S. JAMES,

J. ALVIN JONES,
JAMES J. LINDSAY,
JOHN HANSON MITCHELL,
JAMES C. MORTON,
DR. MILDRED OTENASEK,
RALPH W. POWERS,
WOODROW F. STRONG,
WILLIAM C. WALSH, *Chairman.*

DECEMBER 31, 1959.

[fol. 42] NOTE:

The original report of the Commission was submitted under date of October 10, 1959. The Legislative Council rejected this report by vote of 12 to 5, with all Baltimore representatives who were present voting against the report. The present final report provides for a possible increase in Baltimore City's representation in the General Assembly, but is otherwise approximately the same as the original report.

[fol. 43]

See Opposite ☞

Federal Census Figures for Maryland

	1870	1880	1890	1900	1910	1920	1930	1940	1950 (Estimated)	1959 (Estimated)	1960
Allegany	38,536	38,011	41,571	53,694	62,411	69,938	79,098	86,973	89,556	82,000	82,500
Anne Arundel	24,457	28,526	34,094	40,018	39,533	43,408	55,167	68,375	117,392	194,000	205,000
Baltimore	63,142	87,334	72,969	90,755	122,399	74,817	124,565	155,825	270,273	447,000	465,000
Calvert	9,865	10,538	9,860	10,223	10,325	9,741	9,528	10,484	12,100	14,700	15,000
Caroline	12,101	13,767	13,903	16,248	19,216	18,652	17,387	17,549	18,234	19,400	19,400
Carroll	28,619	30,992	32,376	33,860	33,934	34,245	35,978	39,054	44,907	54,500	55,500
Cecil	25,874	27,108	25,851	24,662	23,759	23,612	25,827	26,407	33,356	48,500	49,500
Charles	15,738	18,548	15,191	18,316	16,386	17,705	16,166	17,612	23,415	31,200	32,000
Dorchester	19,458	23,110	24,843	27,962	28,669	27,895	26,813	28,006	27,815	28,200	28,800
Frederick	47,572	50,482	49,512	51,920	52,673	52,541	54,440	57,312	62,287	70,000	71,200
Garrett (founded 1872)	—	12,175	14,213	17,701	20,105	19,678	19,908	21,981	21,259	20,000	20,000
Harford	22,605	28,042	28,993	28,269	27,905	29,291	31,603	35,060	51,782	70,800	71,000
Howard	14,150	16,141	16,269	16,715	16,106	15,826	16,169	17,175	23,119	30,500	32,000
Kent	17,102	17,605	17,471	18,786	16,957	15,026	14,242	13,465	13,677	15,800	16,000
Montgomery	20,563	24,759	27,185	30,451	32,089	34,921	49,206	83,912	164,401	312,000	325,000
Prince George's	21,138	26,265	26,080	29,898	36,147	43,347	60,095	89,490	194,182	350,000	370,000
Queen Anne's	16,171	19,259	18,461	18,364	16,839	16,001	14,571	14,476	14,579	15,400	15,600
St. Mary's	14,944	16,934	15,819	18,136	17,030	16,112	15,189	14,626	29,114	39,700	40,500
Somerset	18,190	21,668	24,155	25,923	26,455	24,602	23,382	20,965	20,745	21,300	21,390
Talbot	16,137	19,065	19,736	20,342	19,620	18,306	18,583	18,784	19,428	20,200	20,300
Washington	34,712	38,560	39,782	45,133	48,671	59,694	65,882	68,838	78,886	90,000	91,000
Wicomico (founded 1867)	15,802	18,011	19,930	22,852	26,815	28,114	31,229	34,530	39,641	50,200	51,000
Worcester	16,419	19,539	19,747	20,865	21,841	22,309	21,624	21,245	23,148	25,000	25,500
Total Counties	513,295	602,439	607,951	681,093	735,885	715,781	826,652	962,144	1,393,293	2,050,400	2,123,300
Baltimore City	267,354	332,313	434,439	508,957	558,485	733,826	804,874	859,100	949,708	989,000	991,500
State of Maryland	780,649	934,752	1,042,390	1,190,050	1,294,372	1,449,607	1,631,526	1,821,241	2,343,001	3,039,400	3,114,800

[fol. 44]

Exhibit G to Complaint

List of Unsuccessful Attempts to Enact Legislation Calling for a Constitutional Convention

1951 through 1959*

The references in this exhibit are to the pages of the appropriate journals for the years noted. All the bills listed were introduced for the purpose of convening a Constitutional Convention.

1951

1. S.B. 296 was introduced, but tabled (p. 500) on a roll call vote.
2. H.B. 30 was reported from Committee, recommitted (p. 186), and was defeated when an unfavorable report was adopted (p. 233).
3. H.B. 242 was introduced (p. 312), but died in Committee.
4. H.B. 243 was introduced (p. 313), but died in Committee.
5. H.B. 284 was introduced (p. 358), but died in Committee.

1954

6. H.B. 31 was introduced, petitioned from the Rules Committee, and then referred to the Judiciary Committee, which gave it an unfavorable report. The unfavorable report was adopted by the House (p. 424).

1955

7. H.B. 66 was introduced (p. 114), but died in Committee.

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* This information is taken from the journals of the General Assembly for the years concerned, as compiled by the Office of Research of the Legislative Council of the State of Maryland.

1957

8. H.B. 138 was introduced (p. 136), but died in Committee.

[fol. 45] 1958

9. H.B. 47 was introduced, and after being re-referred to the House Judiciary Committee, died there (p. 105).

10. H.B. 58 was introduced and was reported unfavorably to the House of Delegates, which accepted the unfavorable report (p. 364).

[fol. 46]

EXHIBIT H TO COMPLAINT

EXECUTIVE DEPARTMENT

Annapolis, Maryland
July 11, 1960

J. Millard Tawes,
Governor

Mr. Royce Hanson, Executive Vice President,

Committee for Fair Representation,
4907 Redford Road,
Bethesda, Maryland.

DEAR MR. HANSON:

Governor Tawes has reviewed your letter of July 6th, and has asked me to reply to the same.

In the 4th paragraph of your letter you request the Governor to state that he will not sign any commissions to be issued to the members of the General Assembly elected in the 1962 election unless these members have been elected on an "at-large" basis, or unless, prior to that time, the General Assembly should pass legislation designed to amend the Constitution in regard to the re-apportionment of seats in the General Assembly.

Governor Tawes agrees with you and members of your committee that the re-apportionment of seats in the Gen-

eral Assembly, especially in the House of Delegates, is out of balance with the population in our sub-divisions, and, consequently, there is need for a change in the law.

However, I am afraid that what you have requested the Governor to do cannot, at this time, be done legally by him. Section 5, Article 3 of the State Constitution fixes the number of representatives permitted to each County in the House of Delegates. Naturally, the Governor has no authority to change this, nor does he have the authority to refuse to sign a commission on behalf of any individual who has been properly elected to the General Assembly. Neither the Governor, the County Boards of Supervisors of Elections, or the State Board of Canvassers, can do any [fol. 47] more than enforce the law, as it now exists. They cannot adopt the attitude that they will refuse to enforce the law, unless the law has been changed to meet their views.

Thanking you for your interest in this matter, and with kindest personal regards, I am

Sincerely yours,

/s/ Lloyd L. Simpkins,
Executive Assistant to Governor Tawes.

LLS/rnb

In the Circuit Court of Anne Arundel County

Demurrer of Tawes, Etc.

To the Honorable, The Judge of Said Court:

The Respondents, J. Millard Tawes, Governor, Board of State Canvassers, Thomas B. Finan, Secretary of State, member of said Board, Louis L. Goldstein, Ferdinand Sybert, Hooper S. Miles, and James Lloyd Young, also members of said Board, by James O'C. Gentry, Assistant Attorney General, demur to the Bill of Complaint and each and every paragraph thereof heretofore filed herein, and for grounds of said Demurrer, say:

1. Said Bill of Complaint is bad in substance and insufficient in law.

2. The matters and things set forth in said Bill of Complaint are insufficient to entitle the Petitioners to the relief prayed.

3. The matters and things set forth in said Bill of Complaint are insufficient to entitle the Petitioners to any relief in a Court of Equity.

4. Said Bill of Complaint fails to state any cause of action.

5. The Petitioner, "The Maryland Committee for Fair Representation", is not a proper party to these proceedings, in that it has no voting rights nor rights to legislative representation.

6. Said Bill of Complaint, paragraph 11, shows on its face that there is no constitutional or statutory provision [fol. 48] for the relief prayed, and that this Court is asked to usurp purely legislative prerogatives.

7. Said Bill of Complaint, Prayers for Relief No. 3, requests a finding that Article III of the Maryland Constitution violates the United States Civil Rights statutes, whereas it is known that Federal statutes do not supersede or overcome provisions of a State Constitution; therefore, the relief prayed cannot be granted.

8. The relief prayed in said Bill of Complaint cannot be granted without total destruction to the constitutional concept of "separation of powers", since Petitioners ask this Court to direct the Legislature to convene a Constitutional Convention, when the General Assembly has admittedly considered such action but has chosen not to so act.

9. The relief prayed in said Bill of Complaint requests this Court to enjoin the conduct of any State election until the General Assembly takes the action which is advocated by the Petitioners, whereas this Court has no such power to so enjoin an election.

10. And for such other reasons as may be assigned at the hearing.

And as in duty bound, etc.

James O'C. Gentry, Asst. Attorney General, 1201 Mathieson Building, Baltimore 2, Md., Lexington 9-5413, Solicitor for J. Millard Tawes, Governor, Board of State Canvassers and the Members thereof.

IN THE CIRCUIT COURT OF ANNE ARUNDEL COUNTY

DEMURRER OF HANTSKE, ET AL.

To the Honorable, the Judges of Said Court:

The Respondents, Douglas W. Hantske, Edgar A. Bowen and Carroll A. Cole, constituting the Board of Election Supervisors of Anne Arundel County, by Morris Turk, its [fol. 49] Solicitor, demur to the Bill of Complaint filed herein for the following reasons:

1. The Bill of Complaint filed herein is bad in substance and insufficient in law.

2. The matters and things set forth in said Bill of Complaint are insufficient to entitle the Petitioners to the relief prayed.

3. The matters and things set forth in said Bill of Complaint are insufficient to entitle the Petitioners to any relief in a Court of Equity.

4. That said Bill of Complaint fails to state any cause of action.

5. That the Bill of Complaint, on its face, shows that there is no constitutional or statutory provision for the relief prayed, and that the relief prayed is asking the Court to perform the function of the Legislature.

6. That Prayer No. 3 in the Bill of Complaint requests a relief of a Statute to supersede a provision of State Constitution, which, on its face, cannot be granted.

7. That the Bill of Complaint is asking this Court to enjoin the conduct of elections until the General Assembly

takes the action advocated by the Petitioner, which injunction cannot be granted by this Court.

8. That the prayer which is sought by the Petitioners in this Bill of Complaint for relief is a legislative matter and not a judicial matter.

9. And for such other reasons as may be assigned at the hearing hereof.

And as in duty bound, etc.

Morris Turk, Maryland Inn, Annapolis, Maryland.

[fol. 62]

IN THE CIRCUIT COURT OF ANNE ARUNDEL COUNTY

ORDER FOR APPEAL—Filed March 22, 1961

Pursuant to Rule 811a of the Rules of Procedure, all petitioners of record herein respectfully request the Court (through the Clerk thereof) to enter this Order for Appeal on the docket of this Court. Said Order for Appeal is taken from the order of Judge O. Bowie Duckett, entered on the docket of this Court on February 21, 1961, which decree sustained respondents' demurrers to petitioners' bill of complaint, and also dismissed said bill of complaint without leave to amend, wherein petitioners had sought both declaratory and injunctive relief, as specified in subparagraphs (1) through (11) of the prayers for relief contained in said bill of complaint.

Petitioners respectfully request that the Clerk, pursuant to Rule 811c, prepare and transmit the record in this case to the Court of Appeals, to be transmitted there on or before April 19, 1961, pursuant to Rule 825 of the Rules of Procedure.

[fol. 63]

IN THE COURT OF APPEALS OF MARYLAND

No. 52

September Term, 1961

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al.

v.

J. MILLARD TAWES, GOVERNOR,
and
BOARD OF STATE CANVASSERS, et al.

OPINION, PRESCOTT, J.—April 25, 1962

[fol. 64] In its entire history, this Court has seldom, if ever, been called upon to decide a case of greater, or more far-reaching, importance than the case at bar. It involves the composition and proper organization of the State Government itself, and the correlative duties and responsibilities of the coordinate branches thereof. The problem calls for the best efforts of all three branches of the State Government in order to furnish to the people of Maryland, without the uncertainties of an interregnum and its attendant risk of chaos, an orderly and continuous system of self-government that will not violate any of the provisions of the Maryland or Federal Constitutions. It needs no citation of authority to state that if any portion of the system of Maryland's government infringes upon the Federal Constitution, which is the supreme law of our land, it must yield to the provisions of the Federal Constitution. And if it does infringe upon the Federal Constitution, it is also invalid under our own constitution, which provides:

> "The Constitution of the United States, and the Laws made, or which shall be made, in pursuance thereof, * * * are, and shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby; anything in the Constitution or Law of this State to the contrary notwithstanding." Maryland Declaration of Rights, Article 2.

[fol. 65] We deem it appropriate, at the outset, to say that the questions involved in this case do not bring on a clash between any two branches of our State Government. We, as members of the Judiciary, are not required to declare any previous action of the Governor or of the Legislature invalid or unlawful. The foundation question posed is whether Section 2 or Section 5 of Article III of the Maryland Constitution, or both (the sections that apportion the members of the General Assembly), in view of the present distribution of population in Maryland, constitute an unreasonable, discriminatory dilution of appellants'[1] rights of suffrage (insofar as the 1962 election is concerned), in violation of the Equal Protection clause of the Fourteenth Amendment of the Federal Constitution, which is, of course, the Supreme Law of the entire United States, and specifically made the Supreme Law of this State by Maryland's Constitution, as pointed out above.

The decision of the Supreme Court of the United States in the recent case of *Baker* v. *Carr*, —— U.S. ——, presents problems that must be considered by all three branches of our State Government. There can be no doubt that the decisions of the Supreme Court construing the Federal [fol. 66] Constitution and Acts of Congress pursuant thereto are conclusive and binding, not only upon the state courts,[2] but also upon all other branches and departments of the Federal and State Governments. In the *Baker* case, as in the case at bar, citizens, who were eligible voters, sought declaratory and injunctive relief. They challenged the validity of the Tennessee apportionment statute upon the ground that they were being denied "equal protection of the laws" under the Fourteenth Amendment by virtue of a dilution or debasement of their votes. The District Court dismissed the action on the grounds that the Court lacked jurisdiction and the complaint failed to state a claim upon which relief could be granted (there was also an additional

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[1] This, of course, refers to the individual appellants. We shall use the word "appellants" hereafter quite often as referring only to those who are persons.

[2] This was recognized in this State as early as the decision of the case of Howell v. State, 3 Gill 14.

ground not here pertinent). The Supreme Court reversed, holding that the subject matter was within the federal judicial powers as defined in Article III, § 2 of the Federal Constitution, and Congress had assigned original jurisdiction thereof to the District Courts by Section 1343 (3) of 28 U.S.C. It further held that a justiciable cause of action had been stated upon which the appellants would be entitled to appropriate relief, and the appellants had standing to challenge the apportionment statute. The Court also noted that it had "no cause at this stage to doubt the District Court will be able to fashion relief if violations [fol. 67] of constitutional rights are found." Indeed, Mr. Justice Clark, who preferred that the case be decided upon its merits, suggested, in a concurring opinion, that the District Court do the apportioning. —— U.S. at page ——.

It is our belief that if any action needs to be taken in order to bring the State's system of legislative apportionment into conformity with the requirements of the Fourteenth Amendment and Article 2 of the Maryland Declaration of Rights, it is preferable from the point of view of responsible self-government that the State's own duly constituted officials and the people themselves undertake the task, rather than leave to the Federal judiciary the delicate and perhaps unwelcome task of doing so. We take it under *Baker* v. *Carr, supra*, that it is clearly a task which the Federal courts would be duty bound to undertake, upon a proper showing of the need therefor.[3] Assuming that the allegations of appellants' bill of complaint are true, this can only be accomplished by action upon the part of the Governor of this State, the Legislature and this Court. We proceed to consider whether this can be lawfully done under our present constitution and laws.

The case reaches this Court upon appeal from a decree of the Circuit Court for Anne Arundel County, as a Court of Equity, which sustained demurrers to appellants' bill of complaint requesting declaratory and injunctive relief,[4] and dismissed the same.

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[3] More will be said of the Baker case later.

[4] We have pointed out in at least three recent cases that demurrers should rarely be sustained in suits for declaratory relief.

(footnote continued)

[fol. 68] The bill alleges that the plaintiffs (appellants), with one exception, are residents, taxpayers and eligible voters of the counties of Anne Arundel, Baltimore, Prince George's and Montgomery (hereinafter sometimes referred to as the "four suburban counties"), and the City of Baltimore. The other appellant, the Maryland Committee for Fair Representation, is an unincorporated private association composed of taxpayers and eligible voters residing in the aforementioned counties and elsewhere in Maryland.[5] The defendants (appellees) are: the Governor of this State, whose duty it is to issue commissions to candidates elected to office in state elections, in conformity with the statements and determinations made by the Board of State Canvassers and delivered to him by the Secretary of State (Code [1957], Article 33,[6] section 143 [b]); the Board of State Canvassers (State Canvassers), whose duty it is to determine and declare, upon the basis of the certified copies of election returns made to them by the city and county canvassers, what persons have been elected to office at any [fol. 69] state election, including election to the General Assembly (Section 142 [b]); the Secretary of State, who is required to record the certified statement and determinations of election delivered to him by the State Canvassers and to transmit a copy of the determinations to the Gover-

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Shapiro v. County Comm., 219 Md. 298, 302, 149 A. 2d 396; John B. Robeson v. Gardens, 226 Md. 215, 219, 172 A. 2d 529; Reed v. Pres. of North East, 226 Md. 229, 253, 172 A. 2d 536. The rule concerning the same is stated in Shapiro, supra. The instant case illustrates, as will be seen later, some of the reasons therefor. Although there seems to be little dispute as to the facts, the most that we can do, under the present posture of the appeal, is to assume the truth of well-pleaded facts for the purposes of the demurrers alone. Had the actual facts been established, by stipulation or otherwise, much time and expense possibly would have been saved.

[5] One of the demurrers challenged the standing of this party, but the chancellor did not decide the question, nor was any argument made thereon in appellees' brief. We shall, therefore, assume, without deciding, that the Committee is a proper party.

[6] All future references will be made to the Code (1957), Article 33, unless otherwise noted.

nor (Section 143 [a]); and the Board of Election Supervisors of Anne Arundel County.

The bill further alleges (with the allegations supported by Exhibits) that the 1960 population figures, based on the Federal census taken in 1960, show the present total population of Maryland is 3,072,999. The total combined population of the Counties of Anne Arundel, Baltimore, Montgomery and Prince George's and the City of Baltimore is 2,312,485, which is approximately 76% (percentages hereinafter mentioned are usually approximate ones) of the total 1960 population of the State. The population of the remaining 19 counties is 760,514, or 24% of the total population. Yet, under the representation now provided by Sections 2 and 5 of Article III of the Maryland Constitution, the four suburban counties and the six legislative districts of Baltimore City each have one member in the State Senate for a total of 10 out of 29 who comprise that body, or 34% of the total representation in the State Senate; and the said suburban counties and legislative districts of Baltimore have a total of 60 delegates out of a total of 123, who comprise the House of Delegates, or 49% of the total representation in that House.

[fol. 70] Further allegations of the bill assert that the four suburban counties and Baltimore City are the only political subdivisions of the State subjected to under-representation in the General Assembly, and these allegations are supported by plaintiffs' Exhibit D. This Exhibit shows that when the entire population of the State elects 29 senators, each, population-wise, represents some 106,310 persons of that population. None of the counties of Maryland has a population of over 106,310, except the four suburban counties. And, if the composition of the State Senate were based upon the present population alone, the four suburban counties and Baltimore City would be entitled to 22 instead of 10 Senators. The Exhibit shows that in Baltimore County the mean figure of 106,310 persons represents but 22 percent of its population, and varies upward in the other counties to a peak in Kent County, where the same mean figure represents 692 percent of its total population.

The Exhibit discloses a like situation with reference to representation in the House of Delegates, (based upon

25,065 of population for each Delegate): all of the suburban counties and Baltimore City are subjected to under-representation, varying from minus 3% in Baltimore City to minus 225% in Baltimore County, and all of the other counties enjoy over-representation ranging from 23% over-representation in Harford County to 74% in Somerset [fol. 71] County. For examples, it shows that each of the four Delegates from Dorchester County represents a figure of 7,399 of population, while each of the six Delegates from Baltimore County represents 81,700 of population; and each of the three Delegates from Talbot County represents 7,173 of population, while each of the six from Prince George's County represents 59,343.

The bill also contains allegations that the four suburban counties and Baltimore City contributed for the fiscal year ending in 1959, 84% of the income tax revenue, 73% of the sales and use tax revenue, 83% of the corporation franchise tax and 70% of the revenue obtained from business licenses; and, although the four suburban counties contain 46% of the total motor vehicle registrations in the State, they received back only 12% of the total allocation to the various political subdivisions of the motor vehicle fuel tax.

The bill further asserts that no legislative relief is available to the appellants, and it points out and specifically names at least eleven bills that were introduced in the General Assembly, during the last ten years, for achieving some reapportionment of or change in the representation now provided in the aforementioned Sections 2 and/or 5 of Article III, and that legislation proposing the call of a constitutional convention was introduced at the 1954, 1955, 1957 and 1960 sessions of the General Assembly. The [fol. 72] bill then states that all of these reapportionment proposals and the legislation introduced for the purpose of convening a constitutional convention failed of passage because of the opposition of the members of the General Assembly representing the less populous counties.

The bill also states that under the provisions of Section 2 of Article XIV and Section 9 of Article XVII of the Maryland Constitution a referendum with respect to the question of whether a constitutional convention should be convened was held in the 1950 general election, and the

proposal to assemble a convention was approved by a vote of some 200,000 to 70,000, but bills to make the proposal operative introduced at the next session of the General Assembly were tabled.

The complaint further asserts that the appellants are suffering irreparable injury as a consequence of the "illegal discrimination in the exercise and effect of their voting rights and the taxation without adequate representation to which they and all eligible voters" of the four suburban counties and Baltimore City are subjected by virtue of the above mentioned Sections 2 and 5, which sections violate their rights of suffrage guaranteed under the Equal Protection clause.

The prayers, condensed, are:

(1) That the court grant a declaratory judgment holding that Sections 2 and/or 5 of Article III of the Maryland Constitution violate the Fourteenth Amendment of the United States Constitution;

[fol. 73] (2) That the court declare that the representation in the General Assembly as now established by said sections 2 and 5 violates the Civil Rights statutes, *i.e.*, Title 28 U.S.C. 1343 (3) and (4), and Title 42 U.S.C. 1983;

(3) That the court declare that the General Assembly's failure to reapportion its membership in accordance with a formula which reasonably reflects the present population of the different counties and Baltimore City violates the Equal Protection clause and the said Civil Rights statutes, as well as Article 7 of the Maryland Declaration of Rights;

(4) That the court declare the General Assembly's failure to convene a constitutional convention, "as approved in the General Election of 1950," violates Section 2 of Article XIV of the Maryland Constitution as it read in 1950, as well as Articles 1, 7 and 45 of the Declaration of Rights;

(5) That the Court permanently enjoin the Board of State Canvassers and the members thereof, as identified herein, from determining, certifying, or in any other way indicating the Board's approval of the election of any candidate

to the General Assembly of Maryland in any State election to be held in November 1962 or thereafter (unless such future State election be held on an at large basis), until such time as the General Assembly of Maryland shall have enacted and submitted for a referendum vote by the eligible voters of this State, an amendment or amendments [fol. 74] to Sections 2 and 5, Article III of the Maryland Constitution, which would reapportion, on the basis of present population and in conformity with Section 1 of the Fourteenth Amendment of the United States Constitution, the representation which is allotted to the various counties and the City of Baltimore in the General Assembly of Maryland;

(6) That the Court enjoin defendant Tawes from issuing commissions of elections to any candidates for the General Assembly of Maryland in any State election to be held in November 1962, or thereafter (unless such future election be held on an at large basis), until such time as the General Assembly of Maryland shall have taken the action requested in paragraph (5) of these prayers for relief;

(7) That the Court enjoin the Board of Election Supervisors of Anne Arundel County from issuing commissions to any candidates to the General Assembly of Maryland from Anne Arundel County in any state election to be held in November, 1962, or thereafter, unless held on an at large basis, or the General Assembly shall have taken the action requested in prayer (5) above;

(8) That the Court retain jurisdiction of the case, require the defendants to pay the costs, and grant such other and further relief as may seem just and proper.

We shall first determine what we consider the subsidiary questions raised by the appellants. In regard to prayer (2), Section 1983 of Title 42 U.S.C. provides, in part, that "every person" who subjects, under color of law, custom, etc., any other person to the deprivation of his constitutional rights, privileges, etc., shall be liable to the party injured. Section 1343 (3) and (4) of Title 28 U.S.C. gives [fol. 75] original jurisdiction to the Federal District Courts

to redress such deprivations, including equitable relief under any Act of Congress providing for the protection of civil rights. Clearly, Section 1343 (3) and (4) has no application at all, since there is no question pertaining to the jurisdiction of a Federal District Court. Section 1983 of Title 42, U.S.C., though it creates a new liability and affords means for its enforcement and for the enforcement of constitutional and other rights for the protection of which the new cause of action and remedies are given, does not create the constitutional or other rights for the violation of which it affords a cause of action and remedies. On the allegations of the bill, we are unable to see any "violation" of Section 1983. We conclude that there is no basis for a declaration that either of the Sections just referred to is violated by the present Maryland legislative apportionment, even if that apportionment should be found to be invalid under the Fourteenth Amendment.

In view of what we hold below in regard to the other prayers, we deem it unnecessary to consider specifically prayers (3) and (7). The underlying purpose of these prayers and of the whole bill appears to be to obtain relief for the future. Insofar as prayer (3) may seek a declaration as to the past, our comments below on prayer (4) are applicable to it also.

Prayer (4) asks for a mere declaration that the General Assembly's failure to convene a constitutional convention, as the result of an election that occurred more than ten years ago, violates certain of the provisions of our con- [fol. 76] stitution. It is no more, we think, than a request to answer an abstract question, which, if answered, would serve no useful purpose. Such action is not included among the purposes of declaratory relief, under our statutes. 1 Anderson, *Declaratory Judgments*, §§ 3, 222. The declarations requested in prayers (2) and (4) seem to have been framed with the Federal Declaratory Judgments statute, Title 28 U.S.C.A. § 2201, in mind which, as we read it, seems broader in scope than the Maryland statutes relating to declaratory judgments.

This brings us to the pivotal questions to be determined. It will be noted the Court is requested to declare that Sections 2 and/or 5 of Article III (hereafter referred to as

Sections 2 and 5) are unconstitutional, and to enjoin certain of the State's officials from certifying the election of candidates, *at the election to be held in November 1962*, in the absence of some relief from the infringement upon the appellants' asserted constitutional rights. As we view the appellants' contentions here, their entire thrust is directed to the election of 1962, and the future, and we shall so consider it.

If Sections 2 and/or 5 are unconstitutional, whose function, duty and obligation is it to declare them to be so? Section 1 of Article IV of the Maryland Constitution vests the judicial power of the State in the Judiciary, and this encompasses *all* the judicial power the State. *Magruder* v. *Swann*, 25 Md. 173. That the Judiciary is the ultimate au- [fol. 77] thority to determine whether constitutional limitations have been transcended is a proposition that has been so long established and frequently applied it can no longer be seriously challenged. Chancellor Kent states that in *Marbury* v. *Madison*, 1 Cranch 137, "The power and duty of the judiciary to disregard an unconstitutional act of Congress, or of any state legislature, were declared [by Chief Justice Marshall], in an argument approaching to the precision and certainty of a mathematical demonstration." 1 Kent's Commentaries (14th ed.) p. 609. For two of the cases in which this Court decided whether provisions of the Maryland Constitution violated the Federal Constitution, see *Anderson* v. *Baker*, 23 Md. 531, and *Toscano* v. *Watkins*, 223 Md. 49, 162 A. 2d 438, reversed 367 U.S. 488.

But it is suggested that although it is the general rule that courts determine questions of constitutional transgressions, this is not so when "political questions," *i.e.*, questions which, under the constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government, are involved; and that the question now being considered is a political one. We are referred to such cases as *Kidd* v. *McCanless*, 292 S.W. 2d 40 (Tenn. 1956), and the cases therein cited. It is unquestionably true that the courts will not determine [fol. 78] purely political questions, but this *consessum* does

not determine whether the question now being considered is a political one. The question would give us considerable concern, and we would discuss it more thoroughly, were it not for the Supreme Court's decision in *Baker* v. *Carr*, *supra*. In that case, where the facts and issues involved were quite similar to those in the case at bar, the Court considered, exhaustively, what are, and what are not, "political questions." It specifically considered *Kidd* v. *McCanless*, affirmed 352 U.S. 920, which was the forerunner of and involved the same statute in, the *Baker* case. No useful purpose would therefore be served if we discuss *Kidd* elaborately. The Court, in *Baker*, flatly, held that the determination of whether or not a question is political is one for the Court, as the ultimate interpreter of the Constitution. And it stated: "We understand the District Court to have read the cited cases [those cited by the District Court in 179 F. Supp., at 826, which included *Kidd* v. *McCanless*, 352 U.S. 920] as compelling the conclusion that since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a 'political question' and was therefore nonjusticiable. We hold that this challenge to an apportionment presents no nonjusticiable 'political question'. *The cited cases* [which as we noted above included *Kidd* v. *McCanless*, *supra* 352 U.S. 920] *do not hold to the contrary*." (Emphasis ours.)

We may add that the Supreme Court of Tennessee in *Kidd* v. *McCanless*, *supra*, did not in terms invoke the political question doctrine, but based its refusal of relief on the [fol. 79] ground that the declaration sought by the plaintiffs would, under the Tennessee doctrine of *de facto* officers, leave the State without a legislature.

Unfortunately, the term "political question" is more a label indicating a result than a guide as to whether or not a particular question is purely political and so non-justiciable. In *Baker* v. *Carr*, *supra*, the Supreme Court's stated holding (as we noted above) were (a) that the court [the District Court] possessed jurisdiction of the subject matter; (b) that a justiciable cause of action was stated upon which appellants would be entitled to appropriate relief; and (c) that the appellants had standing to challenge the Tennessee apportionment statutes. To arrive at holdings

(a) and (b) it was necessary for the Supreme Court to determine only questions of Federal jurisdiction and of justiciability under Federal law. Much of its discussion of prior cases in which the Court had taken the view that the questions therein presented were political, is directed to a showing that many of these cases involved questions the determination of which was committed to one of the other coordinate branches of the Federal Government. A number of these involved the provision of the Federal Constitution guaranteeing a republican form of government to each of the States. Some few cases involving political questions were described as cases in which problems of relief were controlling, such as *Radford* v. *Gary*, 352 U.S. 991 (a per curiam affirmance of the dismissal of a suit by a District Court based upon *Colegrove* v. *Green*, 328 U.S. 549, and *Kidd* v. *McCanless*, above cited).

[fol. 80] There was no need in *Baker* v. *Carr*, *supra*, for the Supreme Court to pass upon the power of a State court to deal with questions of State legislative apportionment. Since we are bound by our State Constitution as well as by the Constitution of the United States to give effect to the supremacy of the latter, and since we recognize the decisions of the Supreme Court of the United States as binding interpretations of the Constitution of the United States, it seems to follow that the holding of the Supreme Court in *Baker* v. *Carr*, *supra*, that a question such as the one here presented does present a justiciable question under the Federal Constitution, is controlling here. Though under the separation of powers rationale for many of the political question cases cited in the *Baker* case, the courts of this State might be powerless if no Federal constitutional right were involved, the very foundation of the appellants' case is the alleged violation of their rights under the Equal Protection clause of the Fourteenth Amendment to the Federal Constitution (and under Article 2 of our Declaration of Rights).

That such a case as this is appropriate for consideration by a State court is, we think, implicit in the vacation of the judgment and remand by the Supreme Court of the United States to the Supreme Court of Michigan of the case of *Scholle* v. *Hare* on April 23, 1962 (—— U.S. ——). This

is an apportionment case involving the provision of the Michigan Constitution, as amended in 1952, which froze representation in the State Senate on a geographical basis [fol. 81] therein fixed by the amendment. The Michigan Court relied heavily upon *Colegrove* v. *Green*, *supra*, in reaching its conclusion (360 Mich. 1, 104 N.W. 2d 63). The jurisdiction and the obligation of State courts to enforce and protect rights created by the Federal Constitution or by Federal statutes is well established, in the absence of any limitation upon State action by Federal statute or by the nature of the right, provided the subject matter is within the general jurisdiction of the State court in which the right is sought to be enforced. *Claflin* v. *Houseman*, 93 U.S. 130; *Robb* v. *Connolly*, 111 U.S. 624, 637; *Mondou* v. *New York, N. H. & H. R. Co.*, 223 U.S. 1; *Mooney* v. *Holohan*, 294 U.S. 103; *United States* v. *Bank of New York & Trust Co.*, 296 U.S. 463, 479; *Testa* v. *Katt*, 330 U.S. 386, 392; *Irvin* v. *Dowd*, 359 U.S. 394. The question here would seem to come down to whether there is anything in the Constitution or laws of Maryland to prevent this Court from acting in this case.

In a number of cases in other States there have been provisions in the constitutions of those States calling for reapportionment by legislative action. Authority to initiate legislation to conform to such a constitutional requirement is not vested in the courts of those States, yet in a number of instances, courts have acted in such cases and have not considered themselves barred from doing so by the political question doctrine. Here, it is alleged that ap- [fol. 82] portionment provisions of our State Constitution impinge upon rights under the Federal Constitution, which are expressly made superior to any conflicting provisions of the State Constitution. If these allegations are well founded, the invalidity of our apportionment provisions is no less than if we had a constitutional requirement for periodic reapportionment by the Legislature on a basis of population and the Legislature had failed to carry out the mandate. The duty of our courts to determine the validity of provisions of the State Constitution in the light of the Federal Constitution is, as we have already noted, well established. As Mr. Justice Brennan pointed out in

the *Baker* case, citing *Nixon* v. *Herndon*, 273 U.S. 536, "the mere fact that the suit seeks protection of a political right does not mean it presents a political question." —— U.S. ——.

The Supreme Court of our nearby, sister State of New Jersey had a very similar situation to the one at bar presented to it in 1960. Citizens, who were taxpayers, brought an action seeking a declaration that the 1941 New Jersey apportionment law then in effect had been rendered unconstitutional by the 1950 census. The Court held that the Judiciary of that State had the solemn duty to interpret laws in the last resort, and, however delicate that duty may be, the courts can not surrender, ignore, or waive it, adding that the authority and duty to act when the Court's jurisdiction is invoked in such cases, in the words of Chief Justice Beasley in *State* v. *Rogers*, 28 A. 726, 757 (N.J.), is " 'so entirely established as not to be debatable.' " There as in the instant case, the argument was made that if the apportionment act were declared unconstitutional, it would [fol. 83] create chaos and break down the framework of the State Government. The Court answered that argument in this manner:

> "There is no doubt, as we have stated, that it is within the competence of the Judiciary to adjudge a reapportionment act violative of the Constitution. Some of the defendants suggest that to do so would be to create chaos or anarchy, because no matter how long the filing of our mandate was withheld to permit the enactment of a curative law, the state government would be completely disrupted if the Legislature did not act within that time. Although we agree that if the 1941 act has become unconstitutional, resort could not be had to an apportionment act of an earlier vintage because any such measure would also be invalid by the same test, we do not believe that the allegedly feared result would ever come about. A judiciary, conscious of the sacrosanct quality of its oath of office to uphold the Constitution, cannot accept an *in terrorem* argument based upon the notion that members of a coequal part of the government will not be just as respectful and regardful of the obligations imposed by their

similar oath. Any less faith on our part would be an unbecoming and unwarranted reflection on the Legislature.

"Concrete examples of justification for such faith are available. The two State v. Cunningham cases, supra, [State ex rel. Lamb v. Cunningham, 83 Wisc. 90, 53 N.W. 35; State v. Cunningham, 81 Wisc. 440, 51 N.W. 724.] reveal that on March 22, 1892, the Supreme Court of Wisconsin declared the existing apportionment act invalid. On July 2, 1892 a special legislative session passed a new act. It, too, was invalidated by the same court on October 7, 1892, but ten days later, at a second special session, another reapportionment was adopted, and that act validated the notices of election previously issued by the Secretary of State for the November 8, 1892, election."

The Court decided it would make no declaration at that time, but it would retain jurisdiction in order to afford the New Jersey Legislature time to consider the adoption of a constitutional reapportionment statute. *Asbury Park Press, Inc.* v. *Woolley*, 161 A. 2d 705, 712, 716. The New Jersey [fol. 84] Legislature met, and, in accordance with its duty, enacted a reapportionment bill.

Also, in *Magraw* v. *Donovan*, 163 F. Supp. 184, a three-judge District Court considered, in 1958, the constitutionality of Minnesota's apportionment statute. The Court assumed jurisdiction, stated that, "it is not to be presumed that the Legislature will refuse * * * to comply with its duty under the State Constitution," and that " * * * if there [were] to be a judicial disruption of the [then] present legislative apportionment * * *, it should not take place unless and until it [could] be shown that the Legislature * * * [at its next meeting] advisedly and deliberately failed and refused to perform its constitutional duty to redistrict the State." The Court then deferred decision in order to afford the Legislature full opportunity to "'heed the constitutional mandate to redistrict,'" but retained jurisdiction with leave to any of the parties, within 60 days after the adjournment of the next session of Minnesota's Legislature, to petition the Court for such action

as they deem appropriate. Thereafter, the Minnesota Legislature, in accordance with its duty, enacted a reapportionment bill, and the action was dismissed.

In *Jones* v. *Freeman*, 146 P. 2d 564, 570, the Supreme Court of Oklahoma stated: "It might be well to point out that in 1938, the courts of twenty-two states had exercised the power, or had stated that they had the power, to review legislative apportionment acts upon constitutional grounds * * * ." See also the Annotation in 2 A.L.R. 1337, and Lewis, *Legislative Apportionment*, 71 Harv. L. Rev. 1057; 1066-1070.

[fol. 85] Section 2 provides, *inter alia*, that one State Senator shall be elected from each county and each of the six legislative districts of Baltimore City, by the qualified voters of their respective counties and legislative districts, and they shall serve for four years from the date of their election.

Section 5 states that the membership of the House of Delegates shall consist of 123 members, and apportions them among the counties and the legislative districts of Baltimore City.

There is no provision of the Maryland Constitution that expressly provides for reapportioning of the representation in the General Assembly.[sa] Article XIV, Section 1 provides for amendments to the Constitution generally. It states, in substance, that the General Assembly may propose amendments, and if passed by three-fifths of all the members elected to each of the Houses, they shall be submitted to the qualified voters of the State for adoption or rejection; and, if it shall appear to the Governor that a majority of the votes cast at said election were cast in favor of the amendments, the Governor shall proclaim said amendments to have been adopted by the people. Section 2 of said Article XIV provides, again in substance, that the General Assembly shall provide by law for taking, at the general election in 1970, and every twenty years thereafter, the sense of the people in regard to the calling of a constitutional convention and if a convention be assembled each county

[sa] Section 4 of Article III provides for altering the boundaries of the legislative districts in Baltimore City to provide approximately equal population in said districts.

[fol. 86] and legislative district shall be entitled to a number of Delegates thereto equal to its total representation in both Houses at the time of the convention. Thus, it is seen that if the allegations of the bill of complaint are true, and we must assume them to be true for the purposes of the demurrer, the chances of the appellants' obtaining relief from the infringement upon their alleged constitutional rights, other than from the courts, is so remote as to be practically nil.

From what we have said above, we hold that the question now under consideration is not a non-justiciable one, but one that it is our duty to determine.

We now arrive at a point where it is proper for us to decide whether the well-pleaded allegations of the bill of complaint, which, as stated above, are admitted for the purposes of the demurrer, are sufficient to show that appellants' constitutional rights of suffrage are being impaired by what they term "the deliberate, discriminatory and gross dilution of [their] rights of suffrage which has prevailed in Maryland since 1867, and grows worse with each passing year." We could write page after page on the cherished rights of citizens to enjoy free and reasonably equal suffrage, disfranchisement through gross malapportionment and its adverse consequences,[7] and the vigorous [fol. 87] criticisms of malapportionment by legal commentators,[8] representatives of the press,[9] and public officials, but, if we did so, it would only be a repetition of what has been said time and time again, and practically all, if not all, of which was considered by the Supreme Court, the ultimate

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[7] See for example: Commission on Intergovernmental Relations, A Report to the President, 38-40 (1955); Douglas, Unequal Voting: A Challenge to Democracy, 1 Labor's Economic Review 88, 89; Baker, Rural v. Urban Political Power, 27, 28; Walter, Reapportionment and Urban Representation, 195 Annals 11, 12.

[8] Lewis, Legislative Apportionment and the Federal Courts, 71 Harv. L. Rev. 1057; Tabor, The Gerrymandering of State and Federal Legislative Districts, 16 Md. L. Rev. 277; 17 Law & Contemp. Prob. 253-469.

[9] Strout, The Next Election is Already Rigged, Harper's Magazine, November, 1959; The Wall Street Journal, October 17, 1960, p. 1.

interpreter of the Federal Constitution, in the case of *Baker* v. *Carr*, *supra*. We think the answer to our present question, in the main part, is contained in the decision in that case.

We do not think it possible (or advisable if it were possible) to state a precise, inflexible and intractable formula for constitutional representation in the General Assembly. The determination in each case must depend upon the facts existent at the time it is decided. In Maryland, there is no requirement, constitutional or otherwise, that such representation be based upon a mathematical ratio of population, or of eligible voters, and we do not intimate such a ratio is necessary to meet constitutional requirements. However, even though the Tennessee Constitution specifically provided that representation in the General Assembly should be apportioned among the counties or districts "according to the number of qualified voters in each," there is a strong implication in the *Baker* decision that there must be some [fol. 88] reasonable relationship of population, or eligible voters, to representation in the General Assembly, if an apportionment is to escape the label of constitutionally-prohibited invidious discrimination. The State is, of course, to be allowed every reasonable latitude in such relationship, and any discrimination therein "will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961). Cf. *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483, 489. The representation in the State Senate of Maryland has traditionally been based more upon area and geographical location (one from each county and each legislative district of Baltimore City) than upon the relationship of population, or eligible voters; hence, a greater latitude may be permissible in the relationship of population, or eligible voters, in the State Senate than in the House of Delegates, or possibly some different basis of apportionment of seats might be permissible.[10] Such a question may be presented in the *Scholle* case.

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[10] The apparent analogy between the political subdivisions of the State and the States of the Union, insofar as legislative representation is concerned is not close, though it is not to be over-

[fol. 89] History,[11] also, has been recognized as a pertinent consideration in the making of a constitutional determination (*Frank* v. *Maryland*, 359 U.S. 360); and geography has also been recognized as worthy of some consider-

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looked entirely. It is, perhaps, more relevant since the adoption of the Seventeenth Amendment, which provides for the popular election of Senators, than it was before; but the difference between a mere political subdivision of a State and a State retaining attributes of sovereignty remains very substantial.

[11] Historically, a distinction has been made between the two Houses in this State ever since the Constitution of 1776. Under it, each county was entitled to four delegates, and the City of Annapolis (a part of Anne Arundel County) was entitled to elect two and Baltimore Town (then a part of Baltimore County) was also entitled to elect two (unless its population should decline). The Senate was selected by electors chosen two per county and one each from Annapolis and Baltimore who then elected six senators from the Eastern Shore and nine from the Western Shore. Under the Constitution of 1851, each county and the City of Baltimore was entitled to elect one senator, but representation in the House of Delegates was to be generally in proportion to population after the census of 1860, with an initial apportionment varying from two to six members for the several counties. No county was to have less than two delegates and Baltimore City was always to have four more delegates than the most populous county. Reapportionment was to be made after each national decennial census, and the number of members of the House was to be not less than 65 nor more than 80. Under the Constitution of 1864, each county and each of the three legislative districts in the City of Baltimore was to elect one senator. Representation in the House of Delegates was to be apportioned on the basis of the white population. Each county was to be entitled to one delegate for each 5000 persons or fractional portion over one-half thereof up to five delegates, to one additional delegate for the next 20,000 persons or fractional portion over one-half thereof, and above that number to one delegate for every 80,000 persons, or fractional portion thereof above one-half. Reapportionments were to be made after each national census. An initial apportionment was made of from 2 to 6 members per county or legislative district. The Constitution of 1867 continued the provision for one senator from each county and from each of the three legislative districts into which the City of Baltimore was divided. The House was to consist initially of from two to six members from the several counties and of six from each legislative district of Baltimore. This was to continue until the next national or state census, after which representation was to be as follows:

ation through the protection which it may afford to some segments of the population in matters of electoral concern. *MacDougall* v. *Green*, 335 U.S. 281. What effect such con-[fol. 90]-siderations may have in the light of the remand of the *Schglle* case and of whatever may be its ultimate disposition, is something which we cannot now determine; nor would the present posture of the case make it appropriate for us to express any definitive opinion with regard to these matters.

The well-pleaded allegations of the bill of complaint, as we have noted above, state that 24% of Maryland's population elect 66% of the State Senators and 51% of the members of her House of Delegates, and, in the present posture of the case, inquiry into the rational basis for such apportionment seems to be called for. We, therefore, hold that the demurrers should have been overruled, and the chancellor should now receive evidence to determine whether or not an invidious discrimination does exist with respect to representation in either or both houses.

[fol. 91] We turn now to the proper relief to be granted, if Sections 2 and/or 5 are determined to be unconstitutional. It is suggested that they should not be declared unconstitutional as to the November election of 1962, because this action would be adjudicating future rights. The courts, or-

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2 delegates for any county of less than 18,000 population; 3 for each county between 18,000 and 28,000; 4 for each county from 28,000 to 40,000; 5 for each county from 40,000 to 55,000; and 6 but no more, for each county with more than 55,000 population. Each Baltimore legislative district was to have as many delegates as the most populous county. Reapportionment was to be made by proclamation of the Governor after each national or any state census. This system continued in force with changes in 1900 to four legislative districts in Baltimore, and in 1922 to six, until 1950, when to check the increasing power of small counties whose representation might still increase long after more populous units had attained their maximums of six each, the membership of the House was frozen at its then total and at the fixed apportionment of members among the State's political subdivisions as it then was—that is, on the basis of the 1940 census. These provisions were continued without substantial change in the 1956 revision of the Constitution, which did not undertake to make substantial changes. (No attempt has been made to include all of the Amendments to the Constitution relating to past apportionments of membership.)

dinarily, will not decide future rights in a declaratory action, but "where the declaration of future rights is bound up with a present necessity of a declaration of the same, and these present rights depend upon such a declaration, then the reason for refusal to grant declaratory relief disappears." 1 Anderson, *op cit.*, § 231. In the same section, the learned author states the same principles thus:

> "After all, however, it should not be overlooked that the true purpose or mission of the Declaratory Judgment Act is to guide parties in their future conduct to avoid useless litigation. If an actual controversy exists and that controversy is of a justiciable character necessary to meet the demands of the act, the remedy may, and should be invoked, and where it appears clearly that the effect of the determination of the issues raised by a decision in a declaratory action will be to avoid much useless expense and burdensome litigation, and it is clear, likewise, that an actual controversy exists, then the remedy is proper, even though it is granted for future use."

See also *Heald* v. *Heald*, 56 Md. 300; *Devecmon* v. *Shaw*, 70 Md. 219, 16 A. 645; *Fleishman* v. *Bregel*, 174 Md. 87, 92, 197 A. 593; Borchard, *Declaratory Judgments* (1st ed.), §§ 339, 340, 542, 543; and compare *Pennington* v. *Pennington*, 70 Md. 418, 17 A. 329. The facts of the instant case bring it within the principles laid down in the above authorities, and the desirability of making a declaration now [fol. 92] relative to Sections 2 and 5 as to the November 1962 election is, we think, obvious.

If the chancellor should find and accordingly declare that Sections 2 and/or 5 of Article III of the Constitution of Maryland and all of the previous provisions of the original Constitution of 1867, and amendments thereto,[12] re-

[12] A reading of the provisions of the original constitution of 1867 relating to the apportionment of membership in the General Assembly, and all amendments thereto, culminating in the present Sections 2 and 5, show that they are in little, if any, better positions to meet the required tests than the sections as they are now constituted. Consequently, if we assume without deciding,

lating to the apportionment of membership (and only to such apportionment) in the General Assembly, insofar as they apply to the General Election of November, 1962, violate the Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States (and are, therefore, also inconsistent with Article 2 of the Declaration of Rights), it would declare that Sections 2 and/or 5 are null, void and of no effect in regard to said election.[13] The court's declaration should make it clear that the tenure and terms of the present members of the General Assembly [fol. 93] are, in no way, affected by such declaration. They have been elected and have qualified as members of the General Assembly, and they are entitled to serve their full terms. Article III, Section 19, and Article XVII, Sections 1 and 3, Constitution of Maryland.

The possibility that an adjudication of the invalidity of Section 2 or Section 5, or both, of Article III might create a total or partial legislative hiatus after the election of 1962, leads us to express some views with regard to procedures which might render action of an equity court going beyond mere declaratory relief unnecessary or inappropriate.

There is no provision in the Constitution or election laws of this State that permits an "at large" election of the members of the General Assembly, as suggested by the appellants. Article III, Section 6, of the Constitution provides that Delegates to the House shall be elected by the qualified voters of the counties, or legislative districts, which said Delegates represent.

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that if, and when, the present Sections 2 and/or 5 are declared unconstitutional, the former sections would, ordinarily, become operative, they will not do so, because they, too, would be unconstitutional. Cf. Scholle v. Hare, 104 N.W. 2d 63, 125 (concurring opinion).

[13] It should be noted that the court is not requested to declare these Sections invalid as of any particular time, but only prospectively as they affect the November, 1962, election. The theory being that, due to the increase and redistribution of population in the State, somewhere along the line they became unconstitutional, and certainly so in reference to the above mentioned election.

If the Court should declare that Sections 2 and/or 5 are invalid as to the November, 1962, election, it should also declare that the Legislature has the power, if called into Special Session by the Governor and such action be deemed appropriate by it, to enact a bill reapportioning its membership for purposes of the November, 1962, election. With Sections 2 and/or 5 no longer a part of the Constitution with reference to said election, this necessarily follows, [fol. 94] because the powers of the General Assembly of Maryland are plenary, except as limited by constitutional provisions. *McMullen* v. *Shepherd*, 133 Md. 157, 104 A. 424; *Brawner* v. *Supervisors*, 141 Md. 586, 119 A. 250; *Hennegan* v. *Geartner*, 186 Md. 551, 47 A. 2d 393. For other Maryland cases to the same effect; see 5 M.L.E., *Constitutional Law*, § 81. Such a bill might include any provisions relating to the primary elections or to nominations for the general election which might be necessary to effectuate the provisions of the bill. See *Hennegan*, just cited.

A reapportionment Act might take the form of an actual increase or decrease in the number of seats in either or both houses of the General Assembly apportioned to the several political subdivisions of the State, or might adjust the number of votes or the fractional votes to be cast by the members so as to achieve the same relative voting strength as if an actual reapportionment of membership (with each member having one vote) were made. If a reapportionment bill be passed as an Emergency Act, the latter course (leaving the membership in both Houses, numerically, as it now is), probably, would avoid a conflict with Article XVI, Section 2, which prohibits an Emergency Measure from creating or abolishing any office.

In the circumstances above assumed, namely, that Sections 2 and/or 5, are declared invalid, the decree might also declare that the General Assembly would be empowered to propose a constitutional amendment providing for reapportionment. This presumably would accomplish the [fol. 95] same result proportionately between the different subdivisions of the State as that provided for in any reapportionment Act adopted for the 1962 election, and it might include provisions for future reapportionment designed to avoid a recurrence of the present problem. Since

it has been traditional in this State to have the matter of representation in the General Assembly expressly regulated by the State Constitution, it might be thought desirable to draft any Act dealing with the 1962 election as a stop-gap measure, and to provide in any Constitutional Amendment that might be proposed a provision confirming and continuing in force the provisions of such an Act after the adoption of the proposed Constitutional Amendment and until the election to be held in 1966.

Of course, the courts cannot direct the Governor to call the General Assembly into extraordinary session; that is a power the exercise of which lies entirely within his discretion. Nor can they compel the General Assembly to enact a reapportionment bill. These are powers that the courts neither possess, nor profess. But, the courts do have the power and authority to restrain the potency of actions of the coordinate branches of the government (except in regard to purely "political questions") when they transcend constitutional limits. *Watkins* v. *Watkins*, 2 Md. 341; *Plan-*
[fol. 96] *ning Commission* v. *Randall*, 209 Md. 18, 26, 120 A. 2d 195. And the courts may require, by mandamus, the performance by executive officers of ministerial duties, and also enjoin them in the performance of such duties. *Magruder* v. *Swann*, 25 Md. 173; *Brooke* v. *Widdicombe*, 39 Md. 386; *Soper* v. *Jones*, 171 Md. 643, 187 A. 833. The issuance of commissions by the Governor to those elected to office has been held by this Court to be ministerial in nature. *Magruder* v. *Swann*; *Brooke* v. *Widdicombe*, both *supra*.

If the Governor sees fit to call a Special Session of the General Assembly and the General Assembly deems it proper to enact a bill that apportions its membership so as to meet constitutional requirements, the chancellor would be unwarranted in granting injunctive relief. He should, therefore, not enjoin anyone at this time, but he should retain jurisdiction, so that proper injunctive relief can be granted before the November, 1962, election, should the situation at that time call for the same.

With this disposition of the case, it becomes unnecessary to discuss appellants' arguments concerning alleged violations of the Due Process clause.

The appellees, who were defendants below, have taken no action that would make it proper to award costs against them in this suit.

[fol. 97] Because of the urgency of the case, we think that our mandate should issue forthwith, and it will be so ordered.

Decree Dismissing Appellants' Bill of Complaint Reversed, and Cause Remanded for Further Proceedings in Conformity With This Opinion; Appellants to Pay the Costs; the Mandate of This Court to Issue Forthwith.

[fol. 99] DISSENTING OPINION

Henderson, J. dissenting:

In *Baker* v. *Carr*, —— U.S. ——, the factual situation was different from that in the instant case. The Tennessee constitution fixed the maximum number of State Senators and Representatives, and called for a census of qualified voters every ten years and a reapportionment among the several counties and districts in accordance with such enumerations. In adopting the latest reapportionment Act in 1901, the Tennessee General Assembly chose to rely upon the Federal Census, and departed widely from the constitutional standard of apportionment. Since that date all legislative proposals for reapportionment failed of passage. Meanwhile there was a substantial growth and redistribution of population, causing a considerable disparity in the ratio of representation to population as between the various counties and districts, and a consequent dilution of the voting strength of the complainants.

In Maryland, the Constitution itself fixes the exact number of State Senators and Delegates and the counties and districts from which they are each elected. There is no provision in the Maryland Constitution or law that calls for reapportionment. Representation in the Senate has always been based on geographical considerations, and never on population. In 1776 the Senate was composed of fifteen Senators, nine from the Western Shore and six from the [fol. 100] Eastern Shore. In 1851, each county and the City of Baltimore became entitled to one Senator. The

Convention probably followed the pattern of the United States Senate, composed of two senators from each state. In 1864, Baltimore City was divided into three districts, and by constitutional amendment in 1922, it became entitled to six. That is the present arrangement; one Senator from each county and one each from the six districts of Baltimore City. See Md. Const., Art. III, sec. 2.

In the House of Delegates, population did not become a factor until 1851. In 1864 and again in 1867, a sliding scale was adopted fixing the representation by numbers ranging from two to six. See Md. Const., Art. III, sec. 5. In 1922, Baltimore City became entitled to 36 Delegates, six from each district. Due to recent shifts in population Baltimore City's representation is now almost at par. The four metropolitan counties have suffered. In 1950, a constitutional amendment, last ratified in 1956, froze the representation on a basis calculated to some extent upon the figures of the Federal Census of 1940. This prevented the small counties from gaining increased representation as their population grew, at the expense of the larger counties and the legislative districts of Baltimore City, whose representation had long since reached the maximum and been frozen at six delegates. The complaint in the instant case is not that the Legislature has failed to obey any constitutional or statutory mandate, but that since 1956 it has re- [fol. 101] peatedly failed to enact proposals for constitutional amendments to set up a legislative body giving more weight to population than to geography as prescribed in the present Constitution. The crucial question in this case is whether Maryland courts can or should attempt to redress the alleged wrong.

Baker v. *Carr, supra,* was a civil action brought in the Federal District Court under 42 U.S.C. §§ 1983 and 1988, to redress an alleged deprivation of Federal rights. It sought a declaration that the 1901 Act of Tennessee was unconstitutional, and an injunction restraining the State Board of Election Supervisors from certifying any further elections under it.[1] It further prayed that unless and until the General Assembly should enact a valid reapportion-

[1] One point left open in *Baker* was whether the local Boards of Election were indispensable parties.

ment, the District Court should either decree a reapportionment by mathematical application of the Tennessee constitutional formulae, or direct the appellees to conduct legislative elections, primary and general, at large. In reversing the three-judge Federal court and remanding the case to the District Court, a plurality of the Supreme Court held that the right asserted was within the reach of judicial protection in the Federal courts under the [fol. 102] Fourteenth Amendment.[2] But there was no suggestion as to how the District Court should proceed. It would appear that the selection of a remedy was left to the ingenuity of the District Court, if and when it should find that the allegations of the bill were supported by proof of an invidious, and an otherwise irremediable, discrimination.

If we assume that no valid justification for the present allocation of representation in Maryland can be made, and that no remedial constitutional amendment can pass the Legislature,[3] and relief by the calling of a Constitutional Convention is likewise unavailing,[4] the instant case would seem to fall within the ambit of *Baker* v. *Carr, supra*. But there are points of distinction. If the Tennessee Act of 1901 were stricken down, and the Legislature were recalcitrant, it is conceivable that the District Court might there order an election to be held and the votes tallied in accordance with the mathematical formulae set out in the Tennessee Constitution. At least, the Court would not have to invent formulae for the purpose. On the other [fol. 103] hand, if the provisions of the Maryland Con-

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[2] It is a somewhat ironic thought that if the Supreme Court had not declined to examine the evidence, on the ground that it was a political question, it would probably have been compelled to hold that the Fourteenth Amendment itself was never validly adopted. See *Coleman* v. *Miller*, 307 U.S. 433, 450.

[3] A bill designed to that end failed of passage by only two votes in the recent Legislative session.

[4] The Attorney General argues that the failure to call a Constitutional Convention after the election of 1950 was not due to the recalcitrance of the Legislature or any other State official, but because there was not the requisite number of votes to meet the requirements of the Maryland Constitution, Art. XIV, sec. 2.

stitution were stricken down there would remain no guide, standard or constitutional means whereby a legislative body could be constituted. Even if the Legislature should then meet and adopt a Constitutional amendment, grave doubts would arise as to their authority to act, even if all of their prior acts were not put in question. The gravity of this situation has impressed other courts, see *Kidd* v. *McCanless*, 292 S.W.2d 40 (Tenn.) (appeal dismissed 352 U.S. 920), *State* v. *Zimmerman*, 23 N.W.2d 610 (Wis.) and *Butcher* v. *Rice*, 153 A.2d 869 (Pa.), and led them to decline to intervene. There would also be a serious time lag before the people could vote upon the proposal and new elections could be held under an amendment so adopted.[5]

I believe it is a basic tenet of the common law, to which the inhabitants of Maryland are entitled under Art. 5 of the Declaration of Rights, that judges do not make law but discover it. Thus, if a novel point is decided, or an erroneous decision is overruled in those rare instances that are permissible under the rule of *stare decisis* to which this Court adheres, the decision relates back to the beginning. Likewise, a decision construing a constitutional provision or statute relates back to the date of its adop- [fol. 104] tion or enactment. It is for this reason that courts seek to find the popular or legislative intention contemporaneous to the adoption or enactment. It would seem to follow that a present declaration and construction of the Fourteenth Amendment would necessarily relate back to the time of its adoption, and not merely speak from the date of the declaration. In any event, it would seem that once a declaration is made, no court can suspend the operation and effect of the decision to a later date. Quite apart from the doctrine of relation back, an adjudication that the present Legislature is unconstitutionally constituted would destroy its power to enact even a proposed amendment to the Maryland Constitution.

In *Griffin* v. *Illinois*, 351 U.S. 12, Mr. Justice Frankfurter, in a concurring opinion, suggested that the decision in that case might be applied prospectively, like a legislative

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[5] It should be noted that the members of the Legislature are elected for four years in Maryland, Art. III, sec. 6.

enactment, but apparently the suggestion was not approved by any other member of the Supreme Court. In the New Jersey case, cited by the majority in the instant case, apparently the Supreme Court of that State made no declaration but merely retained jurisdiction with the clear intimation that, unless the Legislature should act before a dead line, which it fixed, a declaration would be made. I know of no Maryland precedent for such action.

The statement in the majority opinion in the instant case, that if the provisions of the Maryland Constitution, Art. III, secs. 2 and 5, were stricken down, in whole or in part, the Legislature would possess the power to remedy the situation, I think is gratuitous and unsupportable. [fol. 105] The point is not properly before us under Maryland Rule 885, since it was not raised below, and was never mentioned in the arguments in this Court. See also *Comptroller* v. *Aerial Products*, 210 Md. 627, and *Rose* v. *Paape*, 221 Md. 369. In any event, the matter of how the Legislature shall be selected has always been regulated in Maryland by the Constitution itself. To my mind, no doctrine of plenary or inherent powers can take away a right to deal with a subject matter expressly reserved to the people of this State, and vest it in a legislative body. Cf. *Bennett* v. *Jackson*, 116 N.E. 921 (Ind.).

The opinion of a majority of the Court in the instant case goes even further. It directs the chancellor, upon proof of the allegations of the bill, to make a declaration striking down the provisions of one or more sections of the Constitution, but at the same time to defer the effectiveness of the declaration until after the expiration of the terms of office of the present members. I cannot understand how that can be done. But if it can, I cannot see how those members could enact legislation reapportioning and reconstituting the General Assembly in the teeth of constitutional provisions that are still in force and effect. Yet this is required, in addition to the passage of a constitutional amendment, as a condition precedent to the validity of the 1962 elections. The opinion further directs that a clause ratifying the proposed legislative reappor- [fol. 106] tionment be included in the proposed constitutional amendment. It seems to me that this is an advisory

opinion to a coordinate branch of the Government which is not a party to the suit, and a declaration *in terrorem*.

I find nothing in the Maryland law to support the proposition that reapportionment is a subject fit for judicial determination or action. In Art. III, sec. 19, of the Maryland Constitution it is provided that "each House shall be the judge of the qualifications and elections of its members, as prescribed by the Constitution and Laws of the State * * *." This is in line with Art. 8 of the Declaration of Rights concerning the separation of powers. This Court cannot require the legislature to take action within the scope of its prerogative, by mandamus or otherwise. *Planning Commission* v. *Randall*, 209 Md. 18, 24; *Connor* v. *Board of Supervisors*, 212 Md. 379, 385; *Watkins* v. *Watkins*, 2 Md. 341. Cf. *Fergus* v. *Marks*, 152 N.E. 557 (Ill.). Of course, courts cannot compel the people to adopt a new Constitution. Under Art. I of the Declaration of Rights the people have "at all times the inalienable right to alter, reform or abolish the form of Government in such manner as they may deem expedient." On the other hand the Legislature itself cannot impose non-judicial duties upon the courts of this State. *Cromwell* v. *Jackson*, 188 Md. 8, 28, and cases cited. The rule of judicial abstention is wider than the doctrine of separation of powers. [fol. 107] The English and colonial precedents cited by Mr. Justice Frankfurter in his dissenting opinion in *Baker* v. *Carr* denied judicial relief, even before the doctrine of separation of powers was enunciated. The rule of judicial abstention is sometimes based on a lack of jurisdiction, sometimes on judicial policy.

A declaratory judgment itself is not mandatory, but is limited to occasions where a declaration will serve a useful purpose or terminate controversy. *Givner* v. *Cohen*, 208 Md. 23, 37. Constitutional questions are not to be dealt with abstractly. *Liberto* v. *State's Attorney*, 223 Md. 356, 360. We have repeatedly held that this Court cannot render advisory opinions. *Hammond* v. *Lancaster*, 194 Md. 462, 471. Whether this Court is prevented from deciding moot cases by a lack of jurisdiction or a rule of decision is

beside the point.[6] There is little dispute as to the end result.

The prayer in the bill wherein it is implied that, as an alternative, elections at large should be decreed by the court and enforced through the agency of the Board of State Canvassers, set up by Code (1957), Art. 33, sec. 142, seems to me to be untenable. It has been held that the Board acts in a ministerial capacity only. *Bowling* v. *Weakly*, 181 Md. 496. Clearly, the Board has no statutory authority to reapportion. Moreover, Art. III, sec. 9 of the [fol. 108] Maryland Constitution specifically requires that Senator and Delegate reside in the county or legislative district which he may be chosen to represent. It has been held that courts may order an election at large for members of the Federal House of Representatives. See *Brown* v. *Saunders*, 166 S.E. 105 (Va.) and *Smiley* v. *Holm*, 285 U.S. 355. But those cases turn on the fact that the Federal Constitution, Art. I, sec. 4, expressly confers upon Congress a power to legislate on the subject and that Congress has enacted legislation providing in effect, that if the States fail to reapportion so as to equalize votes in Congressional elections according to the constitutional standard, elections shall be at large.[7] There is no equivalent provision as to the members of State legislatures. Cf. *Shriver* v. *Gray*, 276 F.2d 568 (C.A. 5th). Congress has no constitutional power to legislate on the subject, except interstitially, as in the Federal statutes upon which *Baker* v. *Carr*, *supra*, was based.

The appellants argue that even if we lack the power to enforce a declaration, it would serve a useful purpose. I venture to disagree. I think it is not within the realm of judicial propriety to issue a declaration *in terrorem*. In the words of Mr. Justice Clark this would amount to "black-[fol. 109] jacking the Assembly." Mr. Justice Frankfurter, in his dissenting opinion (p. 62 Footnote 151) said: "Appellants' suggestion that, although no relief may need be given, jurisdiction ought to be retained as a 'spur' to legislative action does not merit discussion." The suggestion

[6] See *Lloyd* v. *Supervisors of Elections*, 206 Md. 36, 43.

[7] See 2 U.S.C. § 4.

was not discussed by any other of the members of the Court, in *Baker* v. *Carr*, *supra*. I assume, therefore, that the decision was predicated upon a finding that the Federal District Court possessed the authority to make a declaration effective, although the means was left to future determination.

The argument that convinces a majority of this Court seems to be that because we are obliged to follow the interpretation of the Federal Constitution by the Supreme Court as the Supreme law of the land, we must take some action. It is true that this Court is as firmly bound by the decisions of the Supreme Court as are the Federal courts. But I venture to doubt that the Supreme Court can confer jurisdiction upon the State courts, even to enforce the Federal Constitution, if they possess no such power under the Constitution and laws of this State. Cf. *Niemotko* v. *State*, 194 Md. 247. In any event, I think the Supreme Court, in *Baker*, did not purport to deal with the authority of State courts at all. Nor do I think the remand of the case of *Scholle* v. *Hare*, —— U.S. —— (just decided) forecloses the matter. The remand was for the purpose of allowing the Michigan court to give further consideration [fol. 110] to the question presented in the light of *Baker* v. *Carr*. As I understand it, this was not an adjudication that the State court was not free to adopt its own view of the availability of a State remedy.

In *Baker*, the Supreme Court held that in an extreme case of disproportion in voting strength the Federal courts can and should "fashion" a judicial remedy. It did not hold that there must be a State remedy. On the contrary, in the opinion of the court, delivered by Mr. Justice Brennan, he said (p. 48): "* * * in *Kidd* v. *McCanless*, 200 Tenn. 273, 292 S.W.2d 40, the Supreme Court of Tennessee held that it could not invalidate the very statute at issue in the case at bar, but its holding rested on its state law of remedies, i.e., the state law of *de facto* officers, and not on any view that the norm for legislative apportionment in Tennessee is not numbers of qualified voters resident in the several counties. Of course this Court was there precluded by the adequate state ground, and in dismissing the appeal, 352 U.S. 920, we cited *Anderson*, *supra*,

[343 U.S. 912] as well as *Colegrove* [328 U.S. 549]. Nor does the Tennessee court's decision in that case bear upon this, for just as in *Smith* v. *Holm*, 220 Minn. 486, 19 N.W.2d 914, and *Magraw* v. *Donovan*, 163 F.Supp. 184, 177 F.Supp. 803, a state court's inability to grant relief does not bar a federal court's assuming jurisdiction to inquire into alleged deprivation of Federal constitutional rights. Problems of relief also controlled in *Radford* v. *Gary*, 352 [fol. 111] U.S. 991, affirming the District Court's refusal to mandamus the Governor to call a session of the legislature, to mandamus the legislature then to apportion, [fol. 112] and if they did not comply, to mandamus the State Supreme Court to do so. And *Matthews* v. *Handley*, 361 U.S. 127, affirmed a refusal to strike down the State's gross income tax statute—urged on the ground that the legislature was malapportioned—that had rested on the adequacy of available State legal remedies for suits involving that tax, including challenges to its constitutionality. Lastly, *Colegrove* v. *Barrett*, 330 U.S. 804, in which Mr. Justice Rutledge concurred in this Court's refusal to note the appeal from a dismissal for want of equity, is sufficiently explained by his statement in *Cook* v. *Fortson*, *supra*: 'The discretionary exercise or nonexercise of equitable or declaratory judgment jurisdiction * * * in one case is not precedent in another case where the facts differ.' 329 U.S., at 678, no. 8." Mr. Justice Clark in his concurring opinion also cited the *Kidd* and *Anderson* cases as resting upon adequate state grounds to support the State judgments. It would seem that no member of the Supreme Court, with the possible exception of Mr. Justice Douglas, thought that the *Kidd* case was overruled, or that the ruling in *Baker* precluded the State courts from adopting their own views as to the availability of State remedies.

Since I find nothing in the prior decisions of this Court that would support the exercise of an equitable remedy under the allegations of the bill, I think the chancellor's dismissal of the bill should be affirmed. Judge Horney authorizes me to say that he concurs in the views here expressed.

[fol. 113]

IN COURT OF APPEALS OF MARYLAND

No. 52, September Term, 1961

MARYLAND COMMITTEE FOR FAIR REPRESENTATION ET AL.

v.

J. MILLARD TAWES, GOVERNOR AND BOARD OF STATE CANVASSERS ET AL.

Appeal from the Circuit Court for Anne Arundel County.

Filed: April 21, 1961.

April 25, 1962: Decree dismissing appellants' bill of complaint reversed, and cause remanded for further proceedings in conformity with this opinion; appellants to pay the costs; the mandate of this Court to issue forthwith. Op. Prescott, J.

Henderson, J. files dissenting opinion in which Horney, J. concurs.

MANDATE

STATEMENT OF COSTS:

In Circuit Court:

Record	$ 15.00
Stenographer's Costs	—

In Court of Appeals:

Filing Record on Appeal	20.00
Printing Brief for Appellant	662.39
Reply Brief	
Appellants' Appendix	537.17
2 Appearance Fees—Appellants	20.00
Printing Brief for Appellee	203.15
Portion of Record Extract—Appellee	
2 Appearance Fees—Appellees	20.00

[fol. 113a]

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

Equity No. 13920

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL., Petitioners

v.

J. MILLARD TAWES, GOVERNOR, ET AL., Respondents

ORDER DIRECTING RESPONDENTS TO PLEAD AND SETTING CASE FOR HEARING—May 4, 1962

The final order entered in the above entitled case having been appealed to the Court of Appeals of Maryland and the Court of Appeals of Maryland, on April 24, 1962, having filed an opinion reversing the aforementioned order and issuing its mandate to this Court "because of the urgency of the case", and it appearing to the Court that it is necessary to receive evidence to determine the issues presented, it is therefore hereby Ordered that the Respondents answer the allegations of the Bill of Complaint or otherwise plead within 10 days from the date of this order, and

Be It Further Ordered, that this case be set for hearing before the Court on May 21st, 1962, with briefs to be exchanged between the parties and filed with the Court at or before the date set for hearing.

Dated this fourth day of May, 1962.

O. Bowie Duckett, Judge.

[fol. 114]

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

[Title omitted]

ANSWER—Filed May 14, 1962

To the Honorable, the Judge of Said Court:

The Respondents, J. Millard Tawes, Governor, Board of State Canvassers, Lloyd L. Simpkins, now Secretary of State, member of said Board, Louis L. Goldstein, Comptroller, member of said Board, Thomas B. Finan, now Attorney General, member of said Board, Hooper S. Miles, Treasurer, member of said Board, and James Lloyd Young, Clerk of the Court of Appeals of Maryland, member of said Board, each acting in his official capacity, by Thomas B. Finan, Attorney General, Joseph S. Kaufman, Deputy Attorney General, and James P. Garland, Assistant Attorney General, their attorneys, do pursuant to Rule 372 of the Maryland Rules of Procedure and in obedience to the Order of this Honorable Court dated May 4, 1962, answer the Bill of Complaint as follows:

1. That in answering paragraphs 1, 2, 3 and 4 of the Bill of Complaint, the Respondents admit the allegations and conclusions thereof.

2. That in answering paragraph 5 of the Bill of Complaint, the Respondents admit the allegations thereof.

3. That in answering paragraph 6 of the Bill of Complaint, the Respondents admit that the Respondent J. [fol. 115] Millard Tawes is Governor of the State of Maryland, and further admit that the Board of State Canvassers is an official agency of the State of Maryland and that the members of the Board are the Secretary of State, the Comptroller of the Treasury, the Attorney General, the State Treasurer, and the Clerk of the Court of Appeals. The Respondents further admit that at the time of the filing of the Bill of Complaint, Thomas B. Finan was Secretary of State of Maryland, but since that time the office of Secretary of State has been and is presently occupied by

Lloyd L. Simpkins; the Respondents further admit that Louis L. Goldstein is the Comptroller of the Treasury of the State of Maryland; that at the time of the filing of the Bill of Complaint, C. Ferdinand Sybert was Attorney General, but since that time he has resigned that office and at the present, Thomas B. Finan is Attorney General of Maryland; and that Respondents admit that Hooper S. Miles is the Treasurer of the State of Maryland and that James Lloyd Young is the Clerk of the Court of Appeals.

Further answering said paragraph, these Respondents admit that the Board of Election Supervisors of Anne Arundel County is an agency of the State of Maryland and that the named Respondents are members of that Board.

4. That in answering paragraph 7 of the Bill of Complaint, the Respondents admit the allegations thereof.

5. That in answering paragraph 8 of the Bill of Complaint, the Respondents admit that the Petitioners are private persons, citizens, taxpayers and eligible voters of the State of Maryland. Further answering said paragraph, the Respondents can neither admit nor deny the allegations and conclusions otherwise contained in said paragraph.

6. That in answering paragraphs 9, 10, 11 and 12 of the Bill of Complaint, the Respondents admit that the provisions recited are properly recited from the Constitution of Maryland.

7. That in answering paragraph 13 of the Bill of Complaint, the Respondents say that Exhibit A is an approximate reproduction of the census figures compiled by the Department of Commerce, Bureau of Census, for the year [fol. 116] 1960; however, that the official census return is contained in Exhibit 1, attached hereto (Maryland Manual, 1961-62, p. 629).

8. That in answering paragraph 14 of the Bill of Complaint, the Respondents admit the mathematical figures contained in the allegations of said paragraph; and in further answering said paragraph, the Respondents state that the combination of certain counties and Baltimore City for the purposes of comparison create an artificial combina-

tion of political subdivisions and this combination is irrelevant and immaterial to the rights of the Petitioners and the rights which they seek to protect.

9. That in answering paragraph 15 of the Bill of Complaint, the Respondents admit the mathematical figures contained in the allegations of said paragraph; and in further answering said paragraph, the Respondents state that the combination of certain counties and Baltimore City for the purposes of comparison create an artificial combination of political subdivisions and that this combination is irrelevant and immaterial to the rights of the Petitioners and the rights which they seek to protect.

10. That in answering paragraph 16 of the Bill of Complaint, the Respondents admit the mathematical figures contained in the allegations of said paragraph and in further answering said paragraph, the Respondents state that the combination of certain counties and Baltimore City for the purposes of comparison create an artificial combination of political subdivisions and that this combination is irrelevant and immaterial to the rights of the Petitioners and the rights which they seek to protect.

11. That in answering paragraphs 17, 18 and 19, these Respondents admit the mathematical figures contained in said paragraphs, but believe that the allegations are completely irrelevant and immaterial to the rights sought to be protected by the Petitioners.

12. That in answering paragraph 20 of the Bill of Complaint, the Respondents admit the allegations contained therein.

13. That in answering paragraph 21 of the Bill of Complaint, the Respondents can neither admit nor deny the [fol. 117] allegations thereof, since they contain no facts and are conclusions of law.

14. That in answering paragraph 22 of the Bill of Complaint, the Respondents deny the material allegations thereof, and in further answering said paragraph, state that the representation in the State Senate of Maryland need not be based on nor reasonably related to the present,

population of the counties and the City of Baltimore, in that representation in the Senate has always been based on geographical considerations and not on population alone (see Constitution of 1776, where the Senate was composed of 15 senators, 9 from the western shore and 6 from the eastern shore; the Constitution of 1851, which provided that each county and the City of Baltimore was entitled to one senator; the Constitution of 1864, which also provided for one senator for each county and allotted the City of Baltimore three senatorial districts, which was subsequently amended by the constitutional amendment of 1922, whereby Baltimore became entitled to six senatorial districts). Further answering said paragraph, the Respondents say that from the earliest times until the present, political subdivisions have been entitled to representation regardless of size, since it has been recognized that it was the town or county which was being represented and not the people directly, in at least one branch of the legislature; and in addition, the Federal Constitution, in creating the Senate of the United States, recognizes the claims of the States as political subdivisions in contrast to direct representation of the people in the House of Representatives; and further answering said paragraph, the Respondents believe that representation in the State Senate of Maryland need not be, in order to meet the requirements of equal protection of law, based solely upon population but may be based upon geographical and other considerations. Geographical representation has also been recognized by the people of the State of Maryland in the composition of the judiciary, in that Article IV, Section 14 of the Maryland Constitution, in prescribing the composition of the Court of Appeals, states that the judges of said Court will be composed of members residing in certain geographical [fol. 118] subdivisions or portions of the State and that the Court's composition is based solely upon geographical considerations. This is further evidence of the desire of the people of the State of Maryland to have representation, whether in the legislative department or judicial department, based upon certain geographical considerations.

15. That in answering paragraph 23 of the Bill of Complaint, the Respondents deny the allegations thereof, and

further answering said paragraph state that the representation in the House of Delegates need not be based solely upon the present population of the counties and the City of Baltimore and there is no allegation of invidious discrimination against the Respondents herein, and that the artificial combination of the counties listed in said paragraph does not in itself show any violation of the Fourteenth Amendment to the United States Constitution.

16. That in answering paragraph 24 of the Bill of Complaint, the Respondents deny the allegations and conclusions contained therein.

17. That in answering paragraph 25 of the Bill of Complaint, the Respondents admit the facts contained therein, but deny any inferences or conclusions from said factual allegations.

18. That in answering paragraph 26 of the Bill of Complaint, Respondents deny the allegations thereof.

19. That in answering paragraph 27 of the Bill of Complaint, the Respondents deny the allegations thereof.

20. That in answering paragraph 28 of the Bill of Complaint, the Respondents deny the legal conclusions contained therein.

21. That in answering paragraph 29 of the Bill of Complaint, the Respondents deny the allegations thereof.

22. That in answering paragraphs 30, 31, 32, 33, 34, 35 and 36 of the Bill of Complaint, the Respondents admit all facts contained therein, but believe that the facts are irrelevant to the legal propositions presented, in that they present matters within the legislative discretion of the General Assembly of Maryland and are not properly reviewable by this Court.

23. That in answering paragraphs 37 and 38 of the Bill [fol. 119] of Complaint, the Respondents admit the constitutional provisions therein contained.

24. That in answering paragraph 39 of the Bill of Complaint, the Respondents admit the result of the referendum

of 1950 regarding the question of whether a constitutional convention should be convened, but further answering said paragraph, state that the total number of votes cast on the question of a constitutional convention amounted to 257,437 out of a total vote of approximately 645,631 (Maryland Manual, 1951-52 Edition, pp. 261, etc.), and that as a result, a majority of the voters *voting at the election* did not approve the constitutional amendment and therefore, there was no mandate of the voters at the 1950 election requiring a constitutional convention.

25. That in answering paragraph 40 of the Bill of Complaint, the Respondents admit the factual allegations contained therein; and in further answering said paragraph, the Respondents refer to the fact that in 1956, the voters at the November General Election in that year approved a constitutional amendment changing the time for submitting the question of a constitutional convention until 1970, and that therefore it is respectfully urged that the voters, by the action, have set 1970 as the next time for submitting to a referendum the question of whether a constitutional convention should be called.

26. That in answering paragraph 41 of the Bill of Complaint, the Respondents deny the inferences contained therein, and further state that they are beyond review by this Honorable Court.

27. The Respondents can neither admit nor deny the allegations of paragraphs 42, 43 and 44 of the Bill of Complaint, since those paragraphs are basically opinions of the Petitioners and are not based upon facts set forth in the Bill of Complaint.

28. That in answering paragraphs 45 and 46 of the Bill of Complaint, the Respondents can neither admit nor deny the allegations thereof, since no facts were contained therein, and said paragraphs merely contain conclusions and opinions of the Petitioners.

[fol. 120] 29. That in answering paragraph 47 of the Bill of Complaint, the Respondents admit the provisions thereof.

30. That in answering paragraph 48 of the Bill of Complaint, the Respondents admit the allegations thereof, with the exception that the Secertary of State is now Lloyd L. Simpkins and that the Attorney General is presently Thomas B. Finan.

31. That the Respondents admit the allegations of paragraphs 49 and 50 of the Bill of Complaint.

32. That in answering paragraph 51 of the Bill of Complaint, the Respondents state that it is their duty under their constitutional oath to defend and uphold the Constitution and laws of this State until declared unconstitutional by some court of competent jurisdiction, and that the demand made upon the Respondents would cause them to violate their sworn duty to uphold the Constitution and laws of this State.

33. That in answering paragraphs 52 and 53 of the Bill of Complaint, the Respondents deny the allegations as well as the conclusions contained therein.

Further answering said Bill of Complaint, the Respondents deny all allegations not specifically admitted or otherwise answered.

Wherefore, your Respondents pray that the Bill of Complaint be dismissed, with appropriate costs.

Thomas B. Finan, Attorney General; Joseph S. Kaufman, Deputy Attorney General; James P. Garland, Assistant Attorney General, 1201 Maryland National Bank Bldg., Baltimore 2, Maryland, Telephone: 539-5413, For the Respondents.

[fol. 121] Certificate of Service (omitted in printing).

RESPONDENTS' EXHIBIT NO. 1 TO ANSWER

See Opposite ☞

Table 2.—Population of Maryland, by Counties: 1960 and 1950

County	Population 1960	1950
The State	3,100,689	2,343,001
Allegany	84,169	89,556
Anne Arundel	206,634	117,392
Baltimore	492,428	270,273
Baltimore City	939,024	949,708
Calvert	15,826	12,100
Caroline	19,462	18,234
Carroll	52,785	44,907
Cecil	48,408	33,356
Charles	32,572	23,415
Dorchester	29,666	27,815
Frederick	71,930	62,287
Garrett	20,420	21,259
Harford	76,722	51,782
Howard	36,152	23,119
Kent	15,481	13,677
Montgomery	340,928	164,401
Prince George's	357,395	194,182
Queen Anne's	16,569	14,579
St. Mary's	38,915	29,111
Somerset	19,623	20,745
Talbot	21,578	19,428
Washington	91,219	78,886
Wicomico	49,050	39,641
Worcester	23,733	23,148

[fol. 123] [File endorsement omitted]

IN THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY, MARYLAND

[Title omitted]

MOTION FOR SUMMARY JUDGMENT—Filed May 16, 1962

Now Come the petitioners, through their solicitors, pursuant to Rule 610 of the Maryland Rules of Procedure, to allege and to move the Court as follows:

1. Respondents answered the bill of complaint on May 14, 1962.
2. A hearing on the merits is scheduled for May 21, 1962.
3. The bill of complaint, with Exhibits A through H attached, and the answer, with Exhibits attached, establish that there are no genuine issues of material fact raised for determination by the Court.
4. There remain for decision by the Court at the hearing now scheduled for May 21, 1962, only issues of constitutional law, i.e., whether the present representation provided for in the General Assembly of Maryland by virtue of Article III, Secs. 2 and 5 thereof, constitutes the invidious discrimination against voting rights which Section 1 of the Fourteenth Amendment to the Constitution of the United States forbids.
5. Petitioners believe that they are entitled to judgment with respect to the above stated issues of law, as authorized by Rule 610d1 of the Rules of Procedure.

Wherefore, petitioners pray that:

Following hearing on May 21, 1962 of the issues of law presented for decision, the Court grant summary judgment [fol. 124] declaring that the representation now provided for in the Senate of Maryland by Article III, Section 2, of the Maryland Constitution, discriminates against and dilutes voting rights of these petitioners and other citi-

zens of Maryland similarly situated, in a manner prohibited by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

B. Following hearing on May 21, 1962 of the issues of law presented for decision, the Court grant summary judgment declaring that the representation now provided for in the House of Delegates of Maryland by Article III, Section 5, of the Maryland Constitution, discriminates against and dilutes the voting rights of these petitioners and other citizens of Maryland similarly situated, in a manner prohibited by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

C. The Court, following entry of the summary judgments, as prayed for herein, retain jurisdiction of the cause, as directed by the Court of Appeals of Maryland in its decision and mandate of April 24, 1962, until the General Assembly of Maryland, at a special session thereof convened for such purpose, enacts legislation, or approves a proposed amendment or amendments to the Maryland Constitution, that would eliminate the invidious discrimination which now exists as a result of the grossly malapportioned representation provided for in both the Senate and House of Delegates of Maryland by virtue of Article III, Secs. 2 and 5 respectively.

Petitioners will serve and file a memorandum of law in support of this motion on or before May 21, 1962.

Respectfully submitted,

Alfred L. Scanlan, 9806 Singleton Drive, Bethesda, Maryland;

Johnson Bowie, County Office Building, Towson, Maryland;

John B. Wright, 12 Church Circle, Annapolis, Maryland;

David MacDonald, 8485 Fenton Street, Silver Spring, Maryland, Solicitors for Petitioners.

[fol. 125] Certificate of Service (omitted in printing).

[fol. 126]

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

No. 13,920 Equity

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al.,

v.

J. MILLARD TAWES, GOVERNOR, et al.

OPINION—Filed May 24, 1962

Question Presented

Does the present composition of the State Senate and/or the House of Delegates of Maryland as provided by Article 3, §§ 2 and 5 of the Maryland Constitution invidiously discriminate against the Petitioners and therefore violate the equal protection clause of the United States Constitution?

How Question Arises

The Bill of Complaint was filed in this Court on August 12th, 1960 by the Maryland Committee for Fair Representation (hereinafter called "Committee) and seven citizens, taxpayers and voters from Montgomery, Anne Arundel, Baltimore and Prince George's Counties (hereinafter called "large" or "suburban" Counties) and Baltimore City against the Governor of Maryland, Board of State Canvassers, Secretary of State, Comptroller of the Treasury, Attorney General, Treasurer, Clerk of the Court of Appeals of Maryland (being members of the State Board of Canvassers) and the Board of Election Supervisors of Anne Arundel County.

Briefly, it is contended that the present system of representation in the Maryland Legislature, whereby the voters of the four (4) suburban Counties and Baltimore City receive representation below that to which they would be entitled if representation was based on population, whereby their right to vote is diluted in violation of the equal [fol. 127] protection and due process clause of the Fourteenth Amendment.

In September, 1960, Demurrers were filed by the Defendants claiming, inter alia, that reapportionment is a political question and as such is not a justiciable controversy but rests with the discretion of the Legislature or the people. The Demurrers were argued on November 12, 1960. On February 21, 1961, this Court, under the ten controlling decisions of the United States Supreme Court, dismissed the Bill of Complaint. This decision was duly appealed to the Court of Appeals of Maryland and argued before five of the Judges of that Court on October 17, 1961. On December 12, 1961, the case was re-argued before seven Judges.

On March 26, 1962, the Supreme Court of the United States in a somewhat similar case, arising from Tennessee, overruled the existing law and in extensive and separate Opinions of 96 pages (6 to 2 decision) held that the District Court possessed jurisdiction of the subject and that a justiciable cause of action was stated. (Baker v. Carr, 7 L. ed. 2d 663.)

On April 25, 1962, the Court of Appeals of Maryland, following the decision of the Supreme Court, reversed the Decree of this Court, and remanded the cause for further proceedings. Judge Henderson filed a dissenting Opinion in which Judge Horney concurred.

Appellate Opinion

The Majority Opinion of the Maryland Court of Appeals, written by Judge Prescott, settles many questions raised in the Petition so that my present function is somewhat limited and narrow. Among other questions, the Appellate Court decided:

(a) That this Court has the power and duty to determine the important question raised by the Petition:

(b) That it is not possible or advisable to provide a precise and inflexible rule or formula for proper representation in the Legislature:

(c) Maryland Law does not require that representation [fol. 128] be based upon a mathematical ratio or population or of eligible voters:

(d) That the tenure and terms of the present members of the General Assembly cannot be changed:

(e) That it would be illegal as suggested by the Petitioners to provide "at large" election of the members of the Legislature.

(f) That the Chancellor should not enjoin anyone at this time, but should retain jurisdiction so that he can grant injunctive relief before the November, 1962 General Election, should the situation then so justify.

(g) That the representation in the Legislature does not violate the Civil Rights Statute, nor § 2, Article XIV of the Maryland Constitution (1950) and Articles 1, 7 and 45 of the Maryland Declaration of Rights.

Chancellor's Hearing

Under the aforesaid Opinion of the Appellate Court, it is my function and duty to receive evidence and determine whether or not an invidious discrimination exists with respect to representation in either or both Houses.

The material allegations of fact in the Bill of Complaint and the exhibits attached thereto were admitted by the Defendants in their Answer. The Defendants denied opinion allegations, conclusions of law and certain inferences. Furthermore, they offered in evidence an official census return (Respondent's Ex. #1); State of Maryland registration figures as of October 1, 1960 (State's Ex. #"A"). State's Election returns for Governor, November 4, 1958 (State's Ex. #B). State Election returns for President of the United States, November 8, 1960 (State's Ex. #"C"). Moreover, in their Answer, Respondents repeatedly state that the combination of the four suburban Counties and Baltimore City create an artificial combination of political subdivisions which is both irrelevant and immaterial, and, in conclusion, request that the Bill of Complaint be dismissed with appropriate costs.

No oral testimony was offered by any of the parties but [fol. 129] arguments were made and briefs submitted by the Solicitor for the Petitioners, the Attorney General and his Deputy on behalf of Governor Tawes and the members of the State Board, Solicitor for the Board of Election Super-

visors of Anne Arundel County, and Solicitors on behalf of several amicus curiae. A Motion for Summary Judgment was also filed on behalf of the Petitioners under Maryland Rule 610.

Basic Constitutional and Equitable Principles

1. First and foremost, it must be remembered as explained by Judge Prescott that the provisions of the Federal Constitution as interpreted by the Supreme Court of the United States are conclusive and constitute the Supreme Law of the entire Country. Wherefore, we find the following in both the Federal Constitution (Art. VI, §2) and the Maryland Constitution (Art. 2, Declaration of Rights):

> "The Constitution of the United States, and the Laws made, or which shall be made, in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, are, and shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby; anything in the Constitution or law of this State to the contrary notwithstanding."

2. That the Judiciary of this State has not only the authority but the duty to declare laws and enactments invalid when they transcend constitutional limits.

3. Every intendment must be resolved in favor of constitutionality and the burden of showing unconstitutionality is on the Petitioners.[1]

4. To declare a section of the State Constitution invalid, as being in violation of the Equal Protection clause of the Fourteenth Amendment, the fact of equality is not enough [fol. 130] as the enactment must be arbitrary, unreasonable, oppressive or an unjust discrimination.[2]

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[1] *McGowan* v. *Md.*, 366 U.S. 420-426; *Johns Hopkins University* v. *Williams*, 199 Md. 382, 86 A2 899; *Norris* v. *Baltimore*, 172 Md. 667, 192 A. 531.

[2] *Pope* v. *Williams*, 98 Md. 59 56 A. 543-aff. 193 U.S. 621-48 L. ed. 87; 5 M.L.E., §231-233 and cases cited therein.

5. History is recognized as a pertinent consideration in the making of a constitutional determination.[3]

6. Geography, to a lesser extent, is also recognized as a pertinent consideration in the making of a constitutional determination.[4]

Composition of State Senate and House of Delegates

With these principles in mind, let us consider whether or not the present composition of the Senate and/or the House of Delegates invidiously discriminates against the Petitioners.

Although different principles may be applied to answer the question regarding the Senate and the House, they should be considered together. This is because a different answer could be made if the Maryland General Assembly were unicameral with one of the compositions instead of bicameral with both compositions.

Counsel during their arguments stated that they knew of no precise formula to determine or define "invidious discrimination" in constitutional issues. Webster's Dictionary defines "invidious" as "tending to excite hatred, ill will or envy; likely to give offense; especially unjustly discriminating or repugnant."

In State of *Oklahoma* v. *Williamson*, 316 U. S. 535, 86 L. ed. 1655, the Supreme Court held that "when the law lays unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made a "discrimination" as invidious as if a particular race or nationality had been selected for oppressive treatment."

In determining whether there is invidious discrimination in this case, I believe that the extent of the disparity is im- [fol. 13F] portant; also, whether the disparity between the Counties or Legislative Districts has any reasonable justification; whether the action of the State Legislature or the constitutional enactment is unjustly arbitrary and unreasonable, keeping in mind, at the same time, that identity of

[3] Judge Prescott's Opinion, p. 23, citing *Frank* v. *Md.*, 359 U.S. 360 and illuminating footnote No. 11.

[4] Judge Prescott's Opinion, p. 23.

treatment is not required if the classification or disparity of voting rests on real and not feigned differences.

Justice Smith aptly said in his prevailing Opinion in the famous Michigan decision:

> "The Constitution of the United States does not require, as we construe equal protection, that there be a precise mathematical correlation between the weights accorded votes. It does not demand the precision of a physicist. But it does demand that the voters' right to substantial equality not be subject to gross, or to wilful and deliberate, deprivation, and it is no more palatable to us that it be accomplished on a grand scale than through the petty larceny of the ward-healer."

Likewise, Justice Kavanagh, in another prevailing opinion, on page 71, quoted from the Wisconsin case[5] to the effect that perfect exactness in the apportionment, according to number of inhabitants is neither required nor possible but that when the wide departure cannot possibly be justified by the exercise of any judgment or discretion on the part of the Legislature, its action is void.

In *MacDougall* v. *Green*, 335 U. S. 281, 98 L. ed. 3, 7, the Supreme Court in a per curiam Opinion, said:

> "• • • To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, [fol. 132] for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the

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[5] *Scholle* v. *Hare*, 360 Mich. 1, 104 N.W.2 63, at p. 93, remanded by Supreme Court on April 23, 1962; 8 L. ed.2 1.

[6] *State* v. *Cuningham*, 81 Wisc. 440 at p. 484; 51 N.W. 724, 739.

polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States."

Article III, §1 of the Constitution of Maryland provides:

"The Legislature shall consist of two distinct branches, a Senate and a House of Delegates, and shall be styled the General Assembly of Maryland."

In my opinion, the use of the word "distinct" in this Section means a substantial or material difference and not merely a slight difference in age eligibility as provided under §9 of the same Article.

Section 2 is succinctly stated by Judge Prescott as follows:

"Section 2 provides, inter alia, that one State Senator shall be elected from each county and each of the six legislative districts of Baltimore City, by the qualified voters of their respective counties and legislative districts, and they shall serve for four years from the date of their election."

Section 5 is as follows:

"The membership of the House of Delegates shall consist of one hundred and twenty-three (123) Delegates, apportioned as follows: Calvert, Caroline, Charles, Howard, Kent, Queen Anne's, and St. Mary's Counties, two Delegates each; Cecil, Garrett, Somerset, Talbot, and Worcester Counties, three Delegates each; Carroll, Dorchester, Harford, and Wicomico Counties, four Delegates each; Allegany, Anne Arundel, Baltimore, Frederick, Montgomery, Prince Georges, and Washington Counties, and each of the six legislative districts of Baltimore City, six Delegates each."

[fol. 133] Section 6 of the same Article also provides:

"The members of the House of Delegates shall be elected by the qualified voters of the Counties, and the legislative districts of Baltimore City, respectively, to serve for four years from the day of their election."

The historic distinction between the two Houses in Maryland was fully explained in footnote 11 of the Appellate Court's Opinion, so will not be repeated. I feel, however, that one of the Houses (in Maryland, the Senate) can be constitutionally based upon area and geographical location regardless of population or eligible voters. Such an arrangement protects the minorities. It prevents hasty, although popular legislation at the time. It is based upon history and reason and helps to protect the republican form of government guaranteed to the States by Article IV, §4 of the United States Constitution. It preserves the checks and balances in the State Government which has worked so well under the Federal. Moreover, there would be little advantage in having a bicameral legislature if the composition and qualifications of the members were similar.

It is true that the great men of the Constitutional Convention of 1787, after lengthy debate, reached a compromise by providing for proportional representation in the Lower House and an equal vote for the States, regardless of population in the Upper House.[7]

Admitting that the plan was a compromise, must it not be conceded that it produced the government under which our great Country has prospered for almost two hundred years?

I do not agree with Petitioners' argument that the States of the Union are sovereign in contrast to the Counties which are but political divisions of the State. States have not been sovereign or independent since the close of the Revolution in 1783 and we cannot turn the clock back to make them so. State sovereignty is contrary to the modern philosophy and operation of government and diminishes with each passing year.

[fol. 134] I am inclined to agree with the Defendants that the combination of the four suburban Counties and Baltimore City for purposes of comparison is artificial. There is no invidious discrimination against Baltimore City in the House and it has a distinct advantage over all the sub-

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[7] *Krause*, The United States, p. 454-459.

urban Counties in the Senate.[8] Anne Arundel County seems to be on the border line but is rapidly growing. It may be pointed out that the inclusion of Baltimore City improperly magnifies the various tax receipts and distributions enumerated in Plaintiffs' Exhibit #2.

The various examples of malapportionment or unfair distribution were discussed in my original opinion and by the Appellate Court, so will not be repeated.

Therefore, without prolonging the matter further and acting as Chancellor under equitable principles, I have no hesitancy in finding from the facts presented that the people of Baltimore, Prince Georges and Montgomery Counties are invidiously discriminated against under the existing law. It necessarily follows that Article III, §5 of the Maryland Constitution must be declared unconstitutional and void as violating the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. In my opinion, the facts are insufficient to establish invidious discrimination against the people of Baltimore City. The question is close in Anne Arundel County, but as the equities must be weighed in favor of constitutionality, I find no invidious discrimination.

Although for the reasons heretofore stated, I do not believe that §2 of Article III is unconstitutional I have decided not to make a determination of the question at this time. The Legislature, the Executive, and the People will have little respect for judicial decisions unless there is some finality in these decisions.

[fol. 135] An Order will therefore be signed in conformity with this Opinion and, as suggested by the Appellate Court.

1. Declaring that §5 of Article III of the Constitution of Maryland and all of the previous provisions of the original Constitution of 1867 and Amendments thereto relating sole-

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[8] The applicability of the Federal System to the State of Maryland is of course weakened by the division of Baltimore City into legislative districts with six (6) Senators instead of one (1). Such an arrangement was probably thought necessary because of the unique position of the City at that time. I do not consider it feasible to discuss the question further at this time, except to note that Los Angeles, with a population of over five (5) million, had but one (1) State Senator.

ly to the apportionment of membership of the House of Delegates insofar as it applies to the General Election of November, 1962, violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and inconsistent with Article 2 of the Declaration of Rights, and therefore null, void and of no effect in regards to said Election, said Declaration having no effect whatsoever upon the tenure and terms of the present members of the House of Delegates.

2. Declaring that the members of the General Assembly have the power, if and when called into Special Session by the Governor, and such action be deemed appropriate by it to enact a bill reapportioning its membership for purposes of the November, 1962 Election.

3. Declaring that the members of the General Assembly, if and when called into Special Session as aforesaid, are empowered in their discretion to propose a constitutional amendment providing for reapportionment.

4. Withholding injunctive relief at this time, but retaining jurisdiction in order that appropriate injunctive relief can be granted before the November, 1962 Election, should the situation at that time so justify.*

Solicitors for the respective parties may submit an appropriate Order in conformity with the above.

O. Bowie Duckett, Judge.

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* I regret that I have not had sufficient time to write a more enlightening Opinion on this important question. The outstanding ability and exhaustive research of many members of the judiciary and writers are amazing and worthy of the highest commendation. This difficult question is now up to the members of the Legislature who are expected to rise above their personal or local views and enact legislation beneficial to the welfare of our State as a whole. Less would be below the exalted standing of the Legislature, as the predominant branch of our Government.

[fol. 136]

IN THE CIRCUIT COURT OF ANNE ARUNDEL COUNTY

No. 13,920 Equity

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al.,

v.

J. MILLARD TAWES, GOVERNOR, et al.

DECREE—May 28, 1962

This Cause having been remanded for further proceedings in conformity with the Opinion of the Court of Appeals of Maryland, filed April 25, 1962 (*228 Md. 412*), and having come on for hearing, Exhibits were filed, Solicitors heard, Briefs submitted and pleadings read and considered;

Whereupon, it is Ordered this 28th day of May, 1962, by the Circuit Court for Anne Arundel County, sitting in Equity, and by authority of this Court for the reasons set forth in the Court's Opinion of May 24, 1962 (*Daily Record*, May 28, 1962), Adjudged, Ordered and Decreed that:

(1) § 5 of Article III of the Constitution of Maryland, and all of the previous provisions of the original Constitution of 1867 and Amendments thereto relating solely to the apportionment of membership of the House of Delegates, in so far as they apply to the General Election of November, 1962, violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and inconsistent with Article 2 of the Declaration of Rights, be, and the same are hereby, declared null, void and of no effect in regards to said Election; said declaration having no effect whatsoever upon the tenure and terms of the present members of the House of Delegates.

(2) In regards to § 2 of Article III of the Constitution of Maryland, the Chancellor makes no finding at this time, but retains jurisdiction and reserves the right for a future Decree under established equitable practice.

[fol. 137] (3) The members of the General Assembly in Special Session, and in any subsequent Session, have the power in their discretion to enact a bill reapportioning its membership for purposes of the November, 1962 Election.

(4) The members of the General Assembly in Special Session, and in any subsequent Session, are empowered likewise in their discretion to propose a constitutional amendment providing for reapportionment.

(5) Injunctive relief is hereby withheld at this time, the Chancellor retaining jurisdiction in order that appropriate relief can be granted before the November, 1962 Election, should the situation at that time so justify; costs to be paid equally by the respective parties.

O. Bowie Duckett, Judge.

[fol. 138]

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

No. 13,920 EQUITY

[Title omitted]

APPEAL

Mr. Clerk:

Please enter the Appeal of the plaintiffs from the decree dated May 28, 1962 in this cause.

Alfred L. Scanlan, John B. Wright, Johnson Bowie, David MacDonald, Solicitors for Plaintiffs.

[fol. 139]

IN THE COURT OF APPEALS OF MARYLAND

No. 94, September Term, 1962

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al., Appellants,

v.

J. MILLARD TAWES, GOVERNOR, et al., Appelles.

ORDER DIRECTING REMAND OF CASE FOR ENTRY OF PROPER DECREE—June 8, 1962

The Court having considered the Appellants' Motion to Accelerate the Appeal herein, the Appellees' Motion to Dismiss the Appeal, and the Appellants' Answer to the Appellees' Motion, it is, this 8th day of June, 1962, Ordered by the Court of Appeals of Maryland that this case be remanded to the Circuit Court for Anne Arundel County, with directions to enter a decree promptly declaring Section 2 of Article III of the Constitution to be valid or invalid, as said Court may determine.

Frederick W. Brune, Chief Judge.

[fol. 140]

IN COURT OF APPEALS OF MARYLAND

No. 94, September Term, 1962

MARYLAND COMMITTEE FOR FAIR REPRESENTATION et al.

v.

J. MILLARD TAWES, GOVERNOR et al.

Appeal from the Circuit Court for Anne Arundel County.

Filed: May 29, 1962.

May 29, 1962: Motion filed to advance hearing, etc.

May 31, 1962: Motion to dismiss appeal filed.

June 6, 1962: Answer to motion to dismiss filed by appellants.

June 8, 1962: Order of Court filed remanding case to lower court with directions to enter a decree promptly declaring Section 2 of Article III of the Constitution to be valid or invalid, as said court may determine.

MANDATE

STATEMENT OF COSTS:

In Circuit Court:

Record	$15.00
Stenographer's Costs	25.00

In Court of Appeals:

Filing Record on Appeal	$20.00
Printing Brief for Appellant	
Reply Brief	
Portion of Record Extract—Appellant	
Appearance Fee—Appellant	
Printing Brief for Appellee	
Portion of Record Extract—Appellee	
Appearance Fee—Appellee	

[fol. 141]

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

No. 13,920 EQUITY

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al.

v.

J. MILLARD TAWES, GOVERNOR, et al.

SUPPLEMENTAL OPINION—June 28, 1962

On June 8th, 1962, the Court of Appeals of Maryland remanded the above case to this Court with directions to

enter a decree declaring Section 2 of Article III of the Maryland Constitution to be valid or invalid, as the Court may determine. This Court must therefore determine whether the Maryland Senate is a legal body.

Since the filing of my Opinion on May 24th, holding that apportionment in the House of Delegates was unconstitutional but making no determination as to the Senate, the General Assembly at the call of the Governor has met in Special Session and on May 31st, 1962 enacted reapportionment legislation which added nineteen (19) members to the House of Delegates. It appears, therefore, and the Petitioners have conceded, that the Lower House has been legally reapportioned according to population. Wherefore, the present issue is much simpler than originally presented when neither House was apportioned on a population basis. The narrow issue now presented is whether that Section of the Maryland Constitution providing for area representation in the Senate is valid or invalid. Stating the question differently, does the Fourteenth Amendment, which guarantees equal protection, require that a State having one House of its Legislature fairly based on population, shall also base its other House on population?

Initially, it must be recognized that it is not the function or duty of a nisi prius court to protect its personal views by changing the law but should follow the existing law and [fol. 142] legal precedents if possible. The Chancellor should not engage in judicial experimentation or void a section of the State Constitution unless clearly illegal. Inequality of representation is not enough for this Court to declare an enactment invalid. There must be unjust or invidious discrimination.[1]

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[1] While the Supreme Court of the United States, and to a lesser extent, the States' Supreme Courts, may alter existing law because of a change in conditions or a change in the viewpoint of society (sometimes called "following the election returns") this function is not one for a trial court. As vividly expressed by one of the greatest Judges of all times: "We have * * * no right as a presently inferior Court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant." Judge Learned Hand, *Spector Motor Serv.* v. *Walsh*, 139 F.2d 803, 823; also quoted *Spector Motor* v. *McLaughlin*, 323 U.S. 101, 89 L.ed. 100 and *Scholle* v. *Hare*, 104 N.W.2d 63,

Up to the present, it must be conceded that there is no authoritative decision holding that both Houses of a Legislature must be based on population. Just as recent as May 25th, Judge Tuttle, speaking for a three-Judge Court,[2] after stating that there is some basis for Plaintiff's contention, said:

> "However that may be, we do not find any authoritative decision by the Supreme Court that causes us to require that in order to give the Plaintiff his constitutional rights the State Legislature must be constituted as two Houses, both of which are elected according to population."

The Solicitor General of the United States in discussing the effect of *Baker* v. *Carr* before the Tennessee Bar Association on June 8th, 1962, said in part:

> " * * * In Baker v. Carr we also argued that the starting point in determining the constitutionality of any apportionment should be *per capita* equality of representation and that any serious departure from this standard is invalid unless shown to have a rational [fol. 143] justification. Both points were largely based upon history, for history is a powerful influence in constitutional law. State constitutions reflect the extent to which the idea of equality of voting power is imbedded in our political heritage, as I indicated above. They also suggest some of the justifications for diverging from exact numerical equality—the claims of historically separate units such as towns and counties to have equal recognition, the desirability of distributing political power geographically, the need to prevent a single large city or two from dominating an entire State; in New Hampshire seats in the Senate are allocated in the ratio of direct taxes paid. I do not mean to suggest how the question should be decided, but it

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at p. 122. Likewise, as Judge Murrah said: "It is not the function of this Court to psychoanalyze the justices of the Supreme Court in order to divine the trend of decisions." (145 F.Supp. 541.)

[2] *Toombs* v. *Fortson*, U.S. Dist. Ct. N.D.Ga., 30 L. Week 2606.

would not surprise me greatly if the Supreme Court were ultimately to hold that if seats in one branch of the legislature are apportioned in direct ratio to population, the allocation of seats in the upper branch may recognize historical, political and geographical subdivisions *provided that the departure from equal representation in proportion to the population is not too extreme.* But surely a very strong argument can also be made that there must be representation proportionate to population in at least one branch of the legislature. * * * "

Difficulties of the Problem

The combination of several factors makes the determination of this involved problem more difficult. Among these are:

(1) The important and far reaching problem, involving the control by one co-ordinate branch of the State Government over another, presents a most delicate question.

(2) Until the recent pronouncement of *Baker* v. *Carr*,[4] the Court had considered the question "political" so there are few recognized precedents or guideposts to follow.

(3) The Supreme Court in *Baker* v. *Carr* laid down no [fol. 144] rules as to what apportionment of representation satisfies the requirements of the Fourteenth Amendment.

(4) The long established reluctance of the judiciary (regardless of its power) to compel action on the part of the Legislature. In this regard, it may be noted that Judges are trained to interpret laws, not to propose or prepare legislation, which function has heretofore been performed by the Legislature.

(5) Unlike many other States, Maryland does not provide for reapportioning the General Assembly or for basing the Senate's representation on population.

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[3] *Comm.* v. *Tawes*, 228 Md. 412; 180 A.2d 656.

[4] 369 U.S. 186; 7 L.ed.2d 663.

(6) The State of Maryland should be "allowed every reasonable latitude * * *, and any discrimination therein will not be set aside if any state of facts reasonably may be conceived to justify it."[5]

(7) Controversies such as this where distinguished Appellate Judges of equal experience and ability reach different conclusions, not on the general law but on their individual beliefs, philosophies or background, tend to establish a government of men and not of law and therefore contrary to our concept of sound government, and in violation of Canon 20 of Judicial Ethics.[6]

Contentions Made

Several strong arguments have been made by the Petitioners in their written and oral arguments before this Court. Points of little merit have also been advanced. For [fol. 145] example, the Petitioners state that maximum dilution of voting rights with respect to the Maryland State Senate reach as high as 33 to 1, whereas in the Michigan case of *Scholle* v. *Hare*, the maximum dilution is 15 to 1. These figures mean very little as the maximum dilution in the United States Senate is 75 to 1. Regardless of this, it must be conceded that if representation in the Maryland Senate is based on population there exists invidious discrimination.

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[5] *Comm.* v. *Tawes*, 228 Md. 412, citing *McGowan* v. *Md.*, 366 U.S. 420, 426 (1961).

[6] *Judicial Canon 20. "Influence of Decisions Upon the Development of the Law."*

"A judge should be mindful that his duty is the application of general law to particular instances, that ours is a government of law and not of men, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. Such action may become a precedent unsettling accepted principles and may have detrimental consequences beyond the immediate controversy. He should administer his office with a due regard to the integrity of the systems of the law itself, remembering that he is not a depository of arbitrary power, but a judge under the sanction of law."

Petitioners also contend in their motion that in the United States Senate a majority of the population has a majority of the representation, which is not the case in the Maryland Senate. This statement is erroneous. According to the 1960 Census, the 26 less populated States have a population in round figures of 31 million, so these States with 17 per cent of the population have 52 per cent of the representation.

Sovereignty

Petitioners' main point is their contention that Maryland should not continue under the Federal Plan because of State sovereignty in contrast to the Counties which are but political divisions of the State. *Daly* v. *Morgan*, 69 Md. 460. My original Opinion to the contrary is stated to be radical. By the great weight of modern authority, States are not now possessed of true or external sovereignty. They do possess internal sovereignty, or at least the right to many of the attributes of internal sovereignty, subject to restrictions imposed by or arising from the Federal Constitution.[7]

Sovereignty in its full sense imports the supreme, absolute and uncontrollable power, subject to no other state, nation or potentate on earth. While a state may still have [fol. 146] some attributes of sovereignty, all must concede that they have been greatly diminished.[8]

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[7] *State* v. *Hyman*, 98 Md. 596, 613; *81 C.J.S.*, States, §2, 858; *Comm.* v. *Hague*, 25 F. Supp. 127; Modified on other grounds 101 F.2d 774; 307 U.S. 496.

[8] *Chrisholm* v. *Ga.*, 2 U.S. 419-455; 1 L.ed.440. *People* v. *Toole*, 86 Pa. 224; 35 Colo. 225. *Moore* v. *Smaw*, 17 Cal. 199-218; 79 Am.Dec. 123. *1 Blackstone*, Commentaries 241-242.

[9] The original thirteen States have not been truly sovereign and independent since the close of the Revolution. The Civil War settled finally and conclusively that the States are merely indispensable units of a single national sovereign. Developments since 1933 have greatly increased the dominance of the national government over state government. States cannot enter into contracts or compacts with other States without Federal permission. They may not deport undesirables found in their midst. The National Government now determines the planting acreage of crops and the conditions and prices in the marketing of milk. Many other

Petitioners therefore contend that because of this so-called "state sovereignty," it is legal and reasonable to base the United States Senate on area alone, but that it is illegal and unreasonable to use the same factor in determining senate representation in Maryland.

Petitioners correctly argue that this Government was a result of a compromise and infer that a better government would have been established if it had not been for the smaller States.[10] Disregarding the fact that the people under this document have prospered for almost 200 years to become the greatest country on earth, I cannot believe that the mere use of the word "sovereignty" can as a practical matter sustain the Federal System and invalidate the States'. If the Petitioners do not believe in the federal or republican form of government but would prefer a pure democracy or town meeting system, they should say so [fol. 147] directly and not masquerade under the guise of state sovereignty.

If our Federal System of checks and balances is good for the Nation, it likewise should be good for the States. While a State undoubtedly possesses more attributes of sovereignty than a Charter County, the difference is largely one of degree and of no practical importance in determining the validity and effectiveness of the system itself. It is merely a play on words to contend that the word "sovereignty" should determine the issue. The desired effect of

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examples of the ever increasing power of the National Government can be given. *Encyclopedia Britannica*, Vol. 2 United States of America, p. 764. *U.S.* v. *Morelock*, 124 F. Supp. 932.

[10] Many do not agree with the position taken by the Petitioners. James Madison, the father of the Constitutional Convention, was of the opinion that there should be equality of men in the House and equality for the States in the Senate, by which means the citizens of the States would be represented both individually and collectively. Checks and balances to curb sudden impulses of mere majorities would thereby be attained.

Sixty years after the Constitutional Convention of 1787, John C. Calhoun paid the smaller States the following tribute: "It is owing mainly to [certain small States] that we have a Federal instead of a National (that is unitary) government,—the best government instead of the worst and most intolerable."

preventing hasty and ill conceived legislation would be attained in the same manner and just as completely in the General Assembly of Maryland as it is in the Congress of the United States.

Legislative Districts

In my opinion, Petitioners' most impressive argument is that the State of Maryland abandoned the federal plan by dividing the City of Baltimore into legislative districts. As stated in original Opinion, the earlier change was probably due to the unique position of Baltimore City at that time. Not only was its population greater than the rest of the State combined, but the City is in quite an unique position due to the fact that it is an independent City or County in itself. It is, therefore, not merely a part of several counties, which is usually the case of other large cities in this Country, such as New York City, for example. The concentrated masses in Baltimore were therefore given several Senators by dividing the City into legislative districts, which was similarly accomplished in the other large cities by being in several counties.

Petitioners also attempt to distinguish the Maryland and Federal Plan by stating in case of the United States, the Lower House is based strictly on population, while in Maryland, it is not. As a matter of fact, the House of Representatives is not based strictly on population because 5 of the least populated States are allocated 1 representative in Congress, even though not entitled under the population ratio. Indians who pay no taxes are also not counted.

[fol. 148] Maryland's Position

The Government of the State of Maryland presents a different problem from that of many other States which have been considered by the Courts. Our State Constitution, contrary to that of others, makes no provision for reapportionment. Our Constitution expressly provides for two distinct branches of the General Assembly. Such required bicameralism presupposes two different and distinct representation bases for its construction and utilization.

So far as history or tradition is a controlling factor, Maryland stands in the forefront. The Senate of the United States itself was formed on the model of that of Maryland.[11]

Representation Based on Population

While representation in the Senate in a number of States is based on population, because of the constitutional requirements of those States, this factor is not universal. Other bases for apportionment are county, district, town and parish areas; male inhabitants, legal voters, direct taxes paid and restricted population by excluding servicemen, aliens and Indians. State senates vary in membership from 17 each in Delaware and Nevada to 67 in Minnesota.[12]

Conclusion

Briefly, the reasons given in the original Opinion that the Maryland Senate can be constitutionally based upon area and geographical location regardless of population, were:

(1) The system protects minorities and prevents hasty, although, popular, legislation at the time.

(2) It preserves checks and balances and the republican form of government.

(3) It is based on history, tradition and reason.

[fol. 149] Nothing has transpired since this Decision to change my mind. Petitioners propose to increase the Senate by 14 members at this time.[13] Under this plan, it would again be necessary to increase the Senate upon an increase in population.

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[11] *The Journal of the Constitutional Convention*, published by G. P. Putnam Sons, 1903, p. 202.

[12] *The Book of the States*, 1960-61, pgs 31 54-58; *43 Mich. L. Rev.*, p. 1091-1112; *17 Law and Contemporary Problems*, pgs 253-469, (1952).

[13] Under this proposal, Baltimore City's representation in the Senate would be increased from 6 to 9; Baltimore County from 1 to 5; Prince George's and Montgomery Counties, each, from 1 to 4, and Anne Arundel County from 1 to 2, thereby increasing the total membership of the Senate from 29 to 43.

Increasing the size of a legislative body is generally not desirable. It sacrifices legislative efficiency and adds to the costs.[14] Petitioners have lately taken the position that if the Maryland Senate cannot be based strictly on population, it should be based partly on population and partly on area. They further state that this modified or hybrid plan is beneficial as it prevents hasty legislation and permits a second look before a law is enacted. The plan is used in a number of States in compliance with their Constitutions, and is generally valid. I feel that this plan merely dilutes or diminishes the benefits obtained under the Maryland and Federal System and would change this State's established Government. It is a plan which Maryland has the power to adopt but which it cannot be compelled to do. Each of the States has the right to determine and establish their own system of representation, provided there is some reasonable ground or justification for this determination. In addition to population, factors such as area, history, geography and tradition have always been recognized as rea- [fol. 150] sonable when applied to one house of a legislature. In my opinion, Article III, Section 2 of the Maryland Constitution is therefore valid and constitutional.

O. Bowie Duckett, Judge.

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[14] If, because of changed conditions, the General Assembly decides that it should follow the Federal Plan strictly, it could reduce Baltimore City's membership in the Senate to 1 and continue a single Senator for each County. Another, and perhaps more feasible, plan properly related to population would be to reduce Baltimore City (pop. 940,000) to 4 Senators, then divide Baltimore County (pop. 492,000) into 2 legislative districts with a Senator for each and continue all other Counties for the present with one Senator. It could then be provided that when any County reached a population of approximately 500,000, it would likewise be entitled to two Senators. Projected population studies show that this would be attained by Montgomery and Prince George's Counties in 1970.

[fol. 151]

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

No. 13,920 EQUITY

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al.,

v.

J. MILLARD TAWES, GOVERNOR, et al.

DECREE—June 28, 1962

The above matter having come on for hearing, in compliance with the Order of the Court of Appeals dated June 8, 1962, counsel were heard, Memoranda submitted, and the Court, for the reasons set forth in its Supplemental Opinion, is of the opinion that Article III, Section 2 of the Constitution is valid.

Whereupon, it is, this 28th day of June, 1962, by the Circuit Court for Anne Arundel County, sitting in Equity, Adjudged, Ordered and Decreed that Section 2 of Article III of the Constitution of the State of Maryland be, and the same is hereby, declared to be valid and constitutional; costs to be paid by the Petitioners.

O. Bowie Duckett, Judge.

[fol. 152]

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

No. 13,920 EQUITY

[Title omitted]

APPEAL

Mr. Clerk:

Please enter the Appeal of the plaintiffs from the decree dated June 28, 1962 in this cause.

Alfred L. Scanlan, John B. Wright, Johnson Bowie, David MacDonald, Solicitors for the Plaintiffs.

[fol. 172]

IN THE COURT OF APPEALS OF MARYLAND

No. 140—Adv.

September Term, 1962

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al.,

v.

J. MILLARD TAWES, GOVERNOR, et al.

Brune, C. J., Henderson, Hammond, Prescott, Horney, Marbury, Macgill, James (Specially assigned), JJ.

PER CURIAM ORDER OF AFFIRMANCE—July 23, 1962

Brune, C. J. and Prescott and Marbury, JJ. dissent.

[fol. 173] It appearing to a majority of the Court, for reasons to be stated in an opinion hereafter to be filed, that the decree appealed from should be affirmed, it is Ordered by the Court of Appeals of Maryland, this 23rd day of July, 1962, that said decree be and it is hereby affirmed, the appellants to pay the costs.

William L. Henderson, Judge.

[fol. 174] [File endorsement omitted]

IN THE COURT OF APPEALS OF MARYLAND

September Term, 1962

No. 140 (Advanced)

Sept. 11, 1962—Motion Denied

William L. Henderson, Asso. Judge

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al., Appellants,

vs.

J. MILLARD TAWES, GOVERNOR, et al., Appellees.

MOTION FOR REARGUMENT (Filed August 2, 1962) AND DENIAL THEREOF (September 11, 1962)

Now Come the appellants, through their attorney, to state to this Honorable Court, as follows:

This case was argued before the Court on the morning of July 23, 1962, after the appeal had been advanced and the hearing date specially set by this Court's order of July 2, 1962. In the late afternoon of that day, the Court issued a *per curiam* order, affirming the decision below, with Chief Judge Brune and Judges Prescott and Marbury dissenting. No opinion has been filed as of the date of the submission of this motion for reargument. Pursuant to Rule 850(a) of the Maryland Rules of Procedure, appellants respectfully move the Court for reargument of the case on the grounds stated in the ensuing sections of this motion. The required fee has been proffered.

I

Recent Relevant Cases and Related Developments

In the days immediately preceding, and during the days following, argument before this Court on July 23, 1962,

a number of pertinent decisions have been handed down by Federal and State courts. Most of these involved a required reapportioning of the Senate of a State legislature. They are:

A. *Alabama.* On July 21, 1962, the United States District Court for the Middle District of Alabama issued an opinion ordering the temporary reapportioning of both [fol. 175] the Senate and the House of Representatives of Alabama on a basis related to population. *Sims* v. *Frink* (C.A. No. 1744, N.) —— F. Supp. —— (M.D. Ala., July 21, 1962). At the time of argument before this Court, the appellants had only abbreviated newspaper reports of the Alabama ruling through which to bring that decision to the attention of this Court. *The New York Times,* July 21, 1962, p. 1. Appellants have now secured a copy of the Alabama court's opinion, and have attached a copy thereof to this motion as Annex 1.

The Federal Court in Alabama refused to accept the attempts of the Alabama legislature to propose a so-called "Federal plan" under which the House of Representatives would be based on population and the Senate would be composed of one Senator from each of the 67 counties of Alabama, without regard to population. In striking down the attempt to reapportion the Senate on a Federal plan basis, the Alabama court said:

> "That portion of the proposed constitutional amendment providing a senator for each of the 67 counties of the State if approved by the voters would serve to make the discrimination in the Senate even more invidious than at present. Under the proposed amendment, senators elected by 20% of the State population could effectively block any proposed legislation, and senators elected by 14% of the population could prevent the submission of any future proposal to amend the Constitution of the State of Alabama. The present control of the Senate by members representing 25.1% of the people of Alabama would be reduced to control by members representing 19.4% of the people of the State. The 34 smallest counties, whose total population is less than that of Jefferson County,

would have a majority of the total membership of the Senate. The only conceivable rationalization of this provision is that it is based on political units of the State and is analogous to the requirement of the Constitution of the United States that the Senate 'shall be composed of two Senators from each State.' Article I, Section 3, Clause 1, superseded by Amendment 17. The analogy cannot survive the most superficial examination into the history of the requirement of the Federal Constitution and the diametrically opposing history of the requirement of the Alabama Constitution that representation shall be based on population. Nor can it survive a comparison of the different political natures of states and counties. It has been held repeatedly in Alabama that a county derives its power from the State; that a county is but a governmental agency, possessing no power and subject to no duty not originating from the law by which it is created and in which its functions are defined. The Alabama courts have said that a county is nothing more than an involuntary political or civil division of the State, created by statute to aid in the administration of government; that whatever power the county possesses, or whatever duty it is required to perform, originates solely in the statutes creating it, or in the statutes declaring its power and duty. *Askew* v. *Hale County*, 54 Ala. 639; *State* v. *Butler*, 225 Ala. 191, 142 So. 531; *Tuscaloosa County* v. *Alabama Great Southern R.R. Co.*, 227 Ala. 428, 150 So. 328; *Montgomery* v. *State*, 228 Ala. 296, 153 So. 394; *Moore* v. *Walker County*, 236 Ala. 688, 185 So. 175."

[fol. 176] As a reading of the above quoted language shows, the Federal Court in Alabama repudiated the analogy on which Judge Duckett attempted to rely to support his finding that a Federal plan (which we do not have) would provide a rational basis for representation in the Maryland General Assembly. The Alabama court went on to adopt a temporary plan of reapportionment of the Alabama legislature which took population into account in both the House of Representatives and the Alabama Senate. In doing that, it observed:

"In the present case that doubtful question is further complicated by the detailed requirements of the Alabama Constitution which, as has been said, make it impossible for the representation in *either* House to be based strictly and entirely upon population. The result may well be that representation according to population *to some extent* must be required in *both* Houses if invidious discrimination in the legislative systems as a whole is to be avoided. Indeed, as has also been observed, it is the policy and theme of the Alabama Constitution to require representation according to population in both Houses as nearly as may be, while still complying with more detailed provisions. So long as only extremely partial representation according to population can be achieved in the House, we do not believe that the principle of representation according to population can be completely abandoned in the Senate, as would be done under the '67-Senator Amendment.' The provision that the Senate shall consist of a senator from each of the 67 counties, in our opinion, in the light of the other provisions of the Alabama Constitution governing representation in the Legislature, would result in invidious discrimination and a denial of the equal protection of the laws. Compare *Brewer* v. *Gray*, Fla. 1956, 86 So. 2d 799."

In imposing temporary reapportionment, while giving the next session of the Alabama legislature a chance "to provide for a true reapportionment of both houses of the Alabama Legislature," the Court expressed the hope that "the moderate steps taken" under its order might be enough "to break the stranglehold" of gross malapportionment. The Court did not regard what it had done, however, as a substitute for "any permanent reapportionment." The Governor of Alabama has announced that no appeal of the adverse decision would be taken. *The New York Times*, July 24, 1962, p. 15.

In Maryland, 14% of the population can elect a majority of the State Senate. The Alabama plan, which the Federal court rejected, would have permitted 19.4% of the people of that State to control its State Senate. Under the plan

proposed by the Alabama legislature, at least the lower [fol. 177] House would have been based on population, which is still not the situation existing with respect to the Maryland House of Delegates.

If the Alabama decision is correctly decided, and we believe that it is, the argument is inescapable that the decision entered in the instant case below, which apparently has been affirmed by this Court's order of July 23, 1962, is in error.

B. *Florida.* On July 23, 1962, the same day on which this Court entered a *per curiam* decree sustaining the Chancellor's ruling that population need not be taken into account in determining the constitutionality of the representation provided in the Maryland State Senate, the United States District Court for the Southern District of Florida decided to the contrary, so far as Florida is concerned, *Sobel* v. *Adams* (C.A. No. 182-62—M), —— F. Supp. —— (S.D. Fla., July 23, 1962). A copy of the Florida court's opinion is attached to this motion for reargument as Annex 2.

In Florida, 12.3% of the population is sufficient to elect a majority of the State Senate. This is one of the very few instances of malapportionment more invidious than that prevailing in the Maryland State Senate, where it takes almost 15% of the population to control the State Senate. In finding that the existing provision of the constitution and statutes of Florida regarding representation violate the Fourteenth Amendment of the Federal Constitution, the Federal Court said:

> "Each of the three representatives in the Florida House of Representatives from Dade County, the most populous county in the State, represents the equivalent of 311,000 people according to the 1960 Federal census. The member from Gilchrist, the least populous county, would represent 2,868 residents. The five most populous counties average one representative for each 106,000 people. The five least populous counties average one representative for each 3,266 people. The membership of the Florida Senate, considered on a basis of representation of numbers, would show a similar disparity

between the more populous and the less populous areas.

"The defendants have set forth for us the history of legislative apportionment in Florida. They have outlined for us the efforts made to procure apportionment on a less discriminatory basis. These efforts, particularly in recent years, have met with little success [fol. 178] and such changes as have been made fall far short of affording any substantial correction of the inequality of representation. Indeed, it would seem that, because of population increases and shifts, the disproportion increased rather than lessened. Without discrediting the efforts of those who have sought to mitigate the conditions existing from time to time, those efforts did not produce any substantial alleviation of the preexisting invidious discriminations in apportionment, nor do they now afford any rational basis for a reapportionment that will meet the requirement of equal protection of the law. They do not constitute a defense to the claims for relief here asserted."

C. *Kansas.* On July 27, 1962, the Shawnee County District Court of the State of Kansas ruled that the present representation in the Kansas legislature, in the Senate and in the lower House thereof, violated both the Federal and State constitutions. *Washington Post & Times Herald,* July 28, 1962, p. A-2.

Disparities in the population of the senatorial districts of Kansas range from 17,000 in the smallest county district to more than 300,000 in the senatorial district embracing Wichita, yet the largest district has no more voice in the Kansas State Senate than the smallest district. Moreover, it appears that in Kansas, 28.8% of the population is required to elect a majority of the Kansas Senate. *Compendium on Legislative Reapportionment* (Nat'l. Munic. League: 1962 Ed.). Appellants have not yet received a copy of the Kansas decision and must rely at this point exclusively on the newspaper report referred to herein. Again, however, it would appear that the composition of a State Senate substantially more representative than that

of Maryland, has been declared to be in violation of the Fourteenth Amendment.

D. *Miscellaneous Cases.* It also appears that as a result of a suit brought in Federal Court in Delaware, the legislature and people of that State may take action to reapportion. *Baltimore Morning Sun*, July 28, 1962, p. 5. The Governor of Delaware convened the legislature, and asked it to adopt a reapportionment plan which would base representation in the lower house in Delaware exclusively on population, while the State Senate would be composed of [fol. 179] seven Senators from each of the State's three counties.[1] This, of course, would still discriminate against New Castle County, the urban center of the State, at least so far as the State Senate is concerned. It is reminiscent of the situation which so long existed in Maryland, with Baltimore as the only urban area in the entire State. Appellants should like to point out, however, that no court decision has been forthcoming either with respect to the constitutionality of existing representation in the Delaware legislature, or with regard to that proposed in Governor Carvel's plan of reapportionment.

We are advised that the Deputy Attorney General has furnished the Court a copy of the opinion of the Court of Common Pleas of Dauphin County, Pennsylvania, a decision which he referred to during the course of his oral argument, *Butcher, et al.* v. *Trimarchi, et al.* (No. 2531 Equity Docket). An examination of that opinion shows clearly that no final decision has been entered in that case concerning the grave reapportionment issues presented therein. The Dauphin County Court noted that:

> "The legislature is now informed, as it has not been heretofore, that constitutional apportionment is a matter that can be adjudicated if the legislature fails to do so."

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[1] The plan, in the form of a proposed constitutional amendment, has been approved by one of two required sessions of the Delaware legislature. *Washington Evening Star*, July 31, 1962, p. A-2.

Since the matter was before the Court exclusively on plaintiff's motion for judgment of the pleadings, the failure to grant judgment cannot be taken as holding in favor of the defendant's contentions that the Pennsylvania legislature is constitutionally apportioned. Indeed, the opinion seems to imply that the opposite would be the result, when and if the Court is finally called upon to determine the constitutional questions.

On July 20, 1962, three days before the argument in this case, the full bench of the Vermont Supreme Court ruled [fol. 180] that the existing apportionment of the Vermont Senate was unconstitutional. *Mikell* v. *Rousseau, et al.* (Chancery No. 385), —— Vt. ——, —— N.E. 2d ——, as reported in *The New York Times*, July 21, 1962, p. 21. In Vermont, the maximum dilution in representation as among Senatorial districts is a little over 6 to 1, the same as the maximum discrepancy now prevailing in the Maryland House of Delegates. In Vermont, 47% of the population is required to elect a majority of the State Senate.

Another recent case, but not involving any challenge to the State Senate arose in Rhode Island, where the Supreme Court of that State ruled that the State's General Assembly had an obligation to reapportion the Rhode Island House of Representatives on the strict basis of the 1960 census. According to newspaper reports, the decision "was regarded in some quarters as making virtually certain a special session of the General Assembly of Rhode Island to deal with the problem." *The New York Times*, July 25, 1962, p. 21.

The recent cases very strongly suggest that if Judge Duckett's ruling is allowed to stand, Maryland will be alone and out of step with all the other States which have had occasion to pass on the question of whether a State Senate must be apportioned on a basis which takes population into some account. As of this date, those States are Alabama, Florida, Kansas, Michigan, Oklahoma, Tennessee and Vermont, with the Georgia decision, previously noted by the appellants in their reply brief, also indicating that the

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[1] The Idaho decision, *Caesar* v. *Williams*, —— Idaho ——, 371 P. 2d 241, involved only the lower house and did not reach a final decision on the merits of the Federal issues.

answer will be the same in that State when the precise issue is finally meet for determination.

[fol. 181]

II

Scholle v. *Hare*, A Weaker Case, Is Not Distinguishable

The recent opinion of the Michigan Supreme Court in *Scholle* v. *Hare*, —— Mich. ——, —— N.W. 2d ——, filed July 18, 1962, which struck down the present representation provided in the Michigan State Senate was brought to the attention of the Court during the course of argument on July 23, 1962.[3] Therefore, we will not restate the substantial reasons why appellants believe that, if the case for reapportionment of the Michigan State Senate is sound, the case for reapportioning of the Maryland State Senate is that much more persuasive. The Court is aware of appellants' reasons for such a contention; in Michigan the maximum dilution in the representation ratio of senatorial districts is 15 to 1; in Maryland it is 33 to 1; in Michigan the lower House is based on population; that is still not the case with respect to the Maryland House of Delegates; in Michigan it takes over 30% of the population to elect a majority of the State Senate; in Maryland 14% of the eligible voters can exercise control of the Maryland State Senate; in Michigan the initiative exists as a remedy for relief against gross malapportionment; the initiative is not made available in the Maryland Constitution; in Michigan, at least, the people of the State had an opportunity to vote upon the issue as to whether or not the present composition of the Michigan State Senate was satisfactory to them; in Maryland there has been no such opportunity afforded since the year 1867.

Appellants now challenge the accuracy of statements made by both the Attorney General and the Deputy Attor-

[3] On July 27, 1962, Justice Potter Stewart of the United States Supreme Court stayed the order of the Michigan Supreme Court pending review of that order by the United States Supreme Court. Justice Stewart emphasized that he was not ruling on the merits of the Michigan Supreme Court's decision, but merely delaying it, on the assumption that four justices of the Supreme Court might consider it proper to review the decision. *Baltimore Morning Sun*, July 28, 1962, p. 5; *Washington Evening Star*, July 28, 1962, p. A-5.

ney General before this Court in attempting to distinguish the *Scholle* case. The Attorney after admitting that he [fol. 182] had not read the recent *Scholle* opinion carefully, proceeded to describe the situation presented in that case as one involving "a deliberate political gerrymander" in contrast to the malapportionment in Maryland, which he apparently prefers to believe has been merely the result of recent population migrations. The Attorney General's above stated characterization of the Michigan situation is not correct. The 1952 amendment to the Michigan constitution which created the senatorial districts challenged in that case, did no more than add 2 districts, making 34 in all, to the previously existing 32 senatorial districts. None of the existing 32 districts were changed in any way, and the 2 new districts were to the advantage, not the disadvantage, of the urban areas. The Michigan senatorial districts were created by the Michigan constitution of 1908, Article V, Sections 2, 3 and 4. Prior to 1952, the Michigan senatorial districts were required to be based on population. The last reapportionment of the Michigan senatorial districts was accomplished in 1925 "in rough reliance upon the 1920 Federal decennial census." *Scholle* v. *Hare*, 360 Mich., 1, 8. The objectionable feature of the 1952 amendment was the elimination of "the decennial reapportionment on a population basis previously required," which thereby perpetually froze the existing senatorial districts of Michigan, much as the existing State representation in Maryland has been frozen since 1867, with the subsequent exceptions afforded in the case of Baltimore. *Ibid.*

Scholle v. *Hare*, therefore, involved no more "deliberate political gerrymander" than presented in the instant case. Actually, both cases involve the so-called "silent gerrymander," which, through the deliberate inaction on the part of legislatures controlled by the less populous subdivisions, permits gross malapportionment to increase each year to the continuing and increasing disadvantage of the more populous areas of a State. If the decision of the Michigan Supreme Court was correct on the constitutional issues presented, and we believe that it was, *a fortiori*, Judge Duckett's opinion below must be held to be erroneous [fol. 183] in deciding that population can be disregarded in

considering whether or not representation in the Maryland State Senate complies with the requirements of the Fourteenth Amendment.

III

Proposed Constitutional Amendments

The Court may be aware that an amendment has been proposed to the Constitution of the United States which would give the States certain authority to apportion representation in their legislatures. *The New York Times*, July 24, 1962, p. 15. On July 23, 1962, Representative Johansen of Michigan introduced a joint resolution in the House of Representatives, proposing an amendment to the Constitution which would guarantee any State the right to establish representation in *one* house of its legislature based on factors other than population *exclusively*. H. J. Res. 829, 87th Cong., 2d Sess., July 23, 1962.

Even under the proposed constitutional amendment, the State's authority to base representation on factors other than population *exclusively* would exist only with respect to one house of its legislature. As its sponsor admitted, the proposed amendment is aimed at overturning the decision in *Scholle*. Cong. Rec., Vol. 108, No. 125, July 23, 1962, p. 13461. A similar amendment also was recently proposed by the Southern Regional Council of the Council of State Governors. *Washington Evening Star*, July 28, 1962, p. A-5. This amendment, too, would vest authority in the States to disregard population *only* in *one* House.

Even if either one or the other of the proposed amendments were to become part of our Federal Constitution, Maryland would still be delinquent, in that representation in its House of Delegates is not based on population exclusively. Moreover, the mere fact that such amendments have been proposed, indicates that so far as the requirements of the equal protection of the laws clause of the Fourteenth Amendment now reach, population cannot be completely disregarded in one house of a State legislature, contrary to the ruling below, which this Court sustained by a vote of 4 to 3 in its order of July 23, 1962.

[fol. 184]

Conclusion and Relief Requested

In attempting to distinguish, or to justify, taking population into account in the case of the Senate representation afforded Baltimore, but no other urban areas, the Attorney General relies on an irrefutable proposition—Baltimore is Baltimore! To this contention, in an attempt to differentiate Maryland's obligation to observe the requirements of equal protection of the laws, as opposed to that imposed on the other States of the Union, he has added another irrebuttable argument—Maryland is Maryland! Both propositions are unassailable, but neither is relevant. Nor can either successfully meet the argument that equal protection of the laws prohibits a State from disregarding population completely, or from applying population on a discriminatory or irrational basis as among urban areas, in the upper House of its legislature. The Fourteenth Amendment cannot require one thing in Alabama, Florida, Kansas, Michigan, Oklahoma and Tennessee, and less than that in Maryland.

Accordingly, for the reasons stated above, and in view of the importance of the issues presented, and the close division of the Court on the *per curiam* order of July 23, 1962, we respectfully request that this case be set for reargument. The Court may wish to limit argument to the question or questions of whether or not recent decisions of the State and Federal courts occurring since July 23, 1962, justify a reversal or modification of the Court's order of that date. Appellants realize that the Court is now in recess and the summer vacation has intervened. Still, if the Court is disposed to allow reargument, there is no reason why it could not set the case for hearing in the fall, prior to taking up the cases on the docket for the September 1962 Term. This would give the parties time to file supplemental briefs if the Court thought that this would be helpful. Since it is clear that the appellants could not hope to obtain any preliminary relief from the Supreme Court of the United States prior to the November 1962 elections, they would not be prejudiced by any delay that might ensue should this case be set for reargument.

For the greater reason, no prejudice would be visited upon [fol. 185] the appellees by such delay. Therefore, appellants urge that the Court grant reargument.

Respectfully submitted,

Alfred L. Scanlan, 9806 Singleton Drive, Bethesda, Maryland;

John B. Wright, 12 Church Circle, Annapolis, Maryland;

Johnson Bowie, County Office Building, Towson, Maryland, Attorneys for the Appellants.

Of Counsel: Shea & Gardner, 734 15th St., N.W., Washington 5, D. C.

Filed: August 1, 1962

Certificate of Service (omitted in printing).

[fol. 186]

ANNEX 1 TO MOTION

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 1744-N

Filed—July 21, 1962

R. C. Dobson, Clerk

By .....
Deputy Clerk

M. O. SIMS, FRED A. BEAM, WYLIE JOHNSON, G. R. SOUTHARD, MILES S. LEE, PAUL FRIEDMAN, WILLIAM LINDSAY WILLIAMS, WILLIAM P. SHAW, JR., PRENTICE W. THOMAS, RICHARD D. TANNEHILL, PAUL M. BYRNE, DAVID R. BAKER, CHARLES MORGAN, JR., and GEORGE PEACH TAYLOR, for themselves jointly and severally, and for all others similarly situated, Plaintiffs,

R. E. FARR, MARSHALL MEADOWS, JACK HOPPING, JACK RYAN, MAX W. MORGAN, DAVID J. VANN, ROBERT S. VANCE, RICHARD P. HUMPHREY, JR., JOHN W. MCCONNELL, JR., JOSEPH N. LANGAN, WILLIAM M. WILLIAMS, JR., and GARET VAN ANTWERP, Intervening Plaintiffs,

vs.

BETTYE FRINK, Secretary of State of the State of Alabama; HARRELL HAMMONDS, Judge of Probate of Lowndes County, Alabama; JOHN A. SANKEY, Judge of Probate of Montgomery County, Alabama; J. PAUL MEEKS, Judge of Probate of Jefferson County, Alabama; JOHN GRENIER, Chairman of the Alabama State Republican Executive Committee; PERRY O. HOOPER, Secretary of the Alabama State Republican Executive Committee; ROY MAYHALL, Chairman of the Alabama State Democratic Executive Committee; H. G. RAINS, Secretary of the Alabama State Democratic Executive Committee; MACDONALD GALLION, Attorney General of the State of Alabama, Defendants.

Rives, Circuit Judge, and Thomas and Johnson, District Judges.

Plaintiffs and the plaintiff-intervenors, as citizens of the United States and of the State of Alabama, and as taxpayers and duly qualified and registered voters in said State and in the Counties of Jefferson and Mobile, jointly and severally bring this action in their own behalf and in [fol. 187] behalf of all other voters in the State of Alabama who are similarly situated. The defendant Bettye Frink is sued in her capacity as Secretary of State for the State of Alabama and as a State constitutional official, who is charged with certain duties and responsibilities concerning the election of members of the Alabama Legislature. The defendants Hammonds, Sankey and Meeks are the duly elected, qualified and acting probate judges of Lowndes, Montgomery and Jefferson Counties, respectively. They are sued in their official capacity as constitutional officers for the State of Alabama and as representatives of all the probate judges of Alabama, who are charged by law with performing and exercising certain duties and powers in connection with the nomination and election of members of the Alabama Legislature. The defendants Grenier and Mayhall are the duly elected, qualified and acting Chairmen of the Alabama State Republican Executive Committee and of the Alabama State Democratic Executive Committee, respectively. They are made defendants in their official capacity as Chairmen of the Executive Committees of said political parties, who are charged by law in the State of Alabama with performing certain duties and functions in connection with the selection, nomination and election of members of the Alabama Legislature. The defendants Hooper and Rains are the duly elected, qualified and acting Secretaries of the Alabama State Republican Executive Committee and the Alabama State Democratic Executive Committee, respectively. Each is sued in his official capacity as an officer of the political party as indicated and is charged by the law of Alabama with performing certain functions and duties in connection with the selection, nomination and election of the Alabama legislators. The defendant MacDonald Gallion is the duly

elected, qualified and acting Attorney General of the State of Alabama, who is charged by the law of the State of Alabama with performing certain duties and functions in connection with the nomination and election of members of the Alabama Legislature.

The plaintiffs[1] bring this action in their own behalf and in behalf of all registered and qualified voters similarly situated, for a declaration of their rights concerning the apportionment of representatives and senators among the counties of the State of Alabama and for such relief [fol. 188] as may be proper to assure them, and all other voters of the State of Alabama that are similarly situated, free and equal suffrage and equal protection of the laws which plaintiffs claim have been for many years denied them by the defendants and their predecessors in office. The plaintiffs say that this Court has jurisdiction of this cause and that they have a right to institute this cause under 17 Stat. at Large 13 and 16 Stat. at Large 144; 42 U. S. C. §§ 1983 and 1988, as follows:

> "§ *1983. Civil action for deprivation of rights* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."
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> • • • • • • •
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> "§ *1988. Proceedings in vindication of civil rights* The jurisdiction in civil and criminal matters conferred on the districts courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, . . ."

[1] The term "plaintiffs" will be used throughout this opinion to include the original plaintiffs and all intervening plaintiffs.

The plaintiffs, as citizens of the United States and of the State of Alabama, base their claim that they are denied the equal protection of the law accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes, since the Legislature of the State of Alabama has failed and continues to fail to reapportion itself since 1900. Plaintiffs say that the failure of the Alabama Legislature to reapportion itself violates §§ 198, 199 and 200 of the Alabama Constitution of 1901.[2]

In our order of March 30, 1962, setting for hearing the application for interlocutory injunction we indicated our tentative but unanimous opinion that no injunction was required prior to the primary elections, then set for May, 1962, in order for citizens of the State represented by the plaintiffs in this case to be accorded any constitutional rights asserted in time for the exercise of such rights at the general election in November, 1962. In that order [fol. 189] we expressed the further view that there was time for the Legislature of Alabama to comply with its duty prescribed by the Constitution of 1901 of the State of Alabama, and that no action on the part of this Court which was not absolutely essential for the protection of any constitutional rights asserted in the complaint should be taken before the Legislature of Alabama had had a further reasonable but prompt opportunity to comply with its duty. The application for interlocutory injunction was assigned for hearing for April 14, 1962.

On that date we reiterated the same views in continuing the application for interlocutory injunction and resetting it for hearing on July 16, 1962. In that order, for the guidance of counsel and for such aid as we might be, we made certain additional remarks to which we now adhere, as follows:

> "We remain of the same opinion that was expressed in the order setting the application for hearing, viz.: until the Legislature has had a further reasonable but prompt opportunity to comply with its duty under

[2] See Appendix "A."

Sections 199 and 200 of the Constitution of Alabama, this Court should take no action not absolutely essential for the protection of the constitutional rights asserted in the complaint; and no ruling before the primary elections of May 1962 appears essential.

"The application for interlocutory injunction pertains to the conduct of both the primary elections of May 1962 and the general election of November 1962. That application is therefore continued and reset for hearing at 10 o'clock a. m. on Monday, July 16, 1962. The hearing cannot be set for a much later date because, if this Court is to act effectively, some action must be taken in ample time before the general election of November 1962.

"For the guidance of counsel and for such aid as we may be in solving the troublesome but important subject of this litigation, we make the following additional remarks:

"(1) Under the opinion of the Supreme Court of the United States in *Baker* v. *Carr*, No. 6, October Term, 1961, decided March 26, 1962, it seems clear to us that: (a) this Court has jurisdiction of the present action; (b) the complaint as amended states a justiciable cause of action; (c) the plaintiffs have standing to challenge the Alabama apportionment statutes.

"(2) We have no disposition to discourage the introduction of evidence by any party, and in the ordinary case our opinion as to whether the plaintiffs will be entitled to appropriate relief should await the in- [fol. 190] troduction of evidence. However, we take judicial notice of the same facts which are well known to the Justices of the Supreme Court of Alabama and to the people of this State, as expressed on two different occasions in opinions of the Justices.

"'We judicially know that the population of the various counties of this state has changed during the years which have intervened since the Constitution of 1901 was adopted, so that the representation

as provided in §§ 1 and 2 of Title 32, Code 1940, cannot be said to be on a population basis.'

Opinion of the Justices of the Supreme Court of Alabama, No. 117, August 14, 1950, 47 So. 2d 714, 717.

"'We know, and the people of this State know, that our Constitution says that it *shall* be the duty of the legislature to reapportion the legislature according to population after each decennial census and that this constitutional mandate of the Constitution of 1901 has never been complied with.'

Opinion of the Justices of the Supreme Court of Alabama, No. 148, July 11, 1955, 81 So. 2d 881, 887.

"(3) The controlling constitutional formula which runs throughout the Constitution of Alabama is thus expressed in the last sentence of Section 284 of said Constitution: 'Representation in the legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendments.' See also Sections 198 to 201, inclusive. If that formula is met, then there can be no valid objection under the equal protection clause or any other part of the Constitution of the United States, which is, of course, the supreme law of the Land, binding alike on this Court and on the Legislature of Alabama (Article VI, Clauses 2 and 3 of the Constitution of the United States). It is necessary that any action taken by the Legislature comply with constitutional standards, and it is important that such standards be met not halfheartedly but fully, because once there has been a legislative reapportionment, unless it so completely fails to meet constitutional standards that it must be set aside by court order, it will not be subject to alteration until the next session of the Legislature after the decennial census in 1970 (Constitution of Alabama, Section 198).

"(4) In the event that the Legislature of Alabama complies with its duty before the next hearing, and this Court can so find, then no further action will

be needed in this case and the case can be dismissed. If the Legislature does not act, or if its action does not meet constitutional standards, then we will be under a clear duty to take some action in time to take effect before the general election of November 1962. Such action, however, should be held to the minimum that is necessary for the citizens of Alabama to be accorded their constitutional rights.

"(5) To that end, it is fair to advise the parties of our present thinking that we would then follow the plan suggested in the concurring opinion of Mr. Justice [fol. 191] Clark in *Baker* v. *Carr, supra*:

> "'One plan might be to start with the existing assembly districts, consolidate some of them, and award the seats thus released to those counties suffering the most egregious discrimination. Other possibilities are present and might be more effective. But the plan here suggested would at least release the strangle hold now on the Assembly and permit it to redistrict itself.'

"(6) While retaining jurisdiction, we could then defer further decision or action to afford the newly elected Legislature full opportunity to heed the constitutional mandate to reapportion. When that has been done the duty resting on us will be at an end and the case can be dismissed."

On July 12, 1962, an Extraordinary Session of the Legislature of Alabama passed a proposed constitutional amendment, commonly referred to as the "67-Senator Amendment," [3] this proposed constitutional amendment being subject to the ratification of the voters of the State of Alabama in an election to be held in November, 1962. On the same date, the Governor of the State of Alabama signed into law the "Crawford-Webb Bill," [4] as passed by the Alabama

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[3] Officially known as Senate Bill 29 and attached hereto as Appendix "B."

[4] Officially known as House Bill 59 and attached hereto as Appendix "C."

Legislature, which has been referred to as a "standby" legislative act to take effect in the event the voters of the State of Alabama refuse to ratify the proposed "67-Senator Amendment," or this Court refuses to accept said "67-Senator Amendment" as effective action that complies with federal constitutional requirements as laid down in *Baker* v. *Carr*, 369 U. S. 186. The final submission on the motion for interlocutory injunction was on July 16, 1962. This submission was upon the pleadings—a part of which were verified, the affidavits and exhibits thereto, the oral testimony and certain exhibits thereto, and the briefs and arguments of the parties.

It has been generally conceded throughout this litigation by all the parties that the present apportionment of both Houses of the Legislature of the State of Alabama constitutes "invidicus discrimination" in violation of the Equal Protection Clause of the Fourteenth Amendment. The invidiousness of the situation is demonstrated by Appendix "D" to this opinion, this appendix listing each of the 67 counties in the State of Alabama, the population of each [fol. 192] county in 1901 when the Legislature was last reapportioned, the present population of each county, and the representatives authorized from each county to the Alabama House of Representatives; and by Appendix "E" listing the 35 senatorial districts, the population of each district in 1900 and the population of each district in 1960 —each senatorial district in Alabama being authorized one representative to the Senate.

Upon this submission, it becomes our duty: (1) to determine whether those Acts comply with constitutional standards and (2) in the event we are forced, however reluctantly, to find that they do not comply with the guaranty of the equal protection of the laws, then to decide what remedies are available to and should be utilized by this Court.

In proceeding to the performance of that duty we would make a few preliminary comments. It is not our function or desire to criticize the present or preceding legislatures for any failure to heed the clear mandate both of the Constitution of the United States and of the Constitution of Alabama. Nor would we criticize the Alabama courts for re-

fusing to afford relief prior to *Scholle* v. *Hare*, 1962, 369 U. S. 429 (see *Waid* v. *Pool*, 225 Ala. 441, 51 So. 2d 869), or even since that decision (see *Ex parte Rice*, —— Ala. ——, May, 1962). However, in the light of the constitutional principles announced in *Baker* v. *Carr*, *supra*, such failures on the parts of the legislative and judicial departments of the State have left the plaintiffs no alternative but to ask the federal courts to protect the constitutional rights of the citizens of Alabama.

Each of the cases which has arisen since *Baker* v. *Carr*, *supra*, has agreed that the test of compliance with the guaranty of the equal protection of the laws is whether the inequality in voting power is a result of "invidious discrimination." *Sanders* v. *Gray*, 203 F. Supp. 158 (April, 1962); *Toombs* v. *Fortson*, C. A. No. 7883, N. D. Ga., May 25, 1962; *Moss* v. *Burkart*, No. 9130, W. D. Okla., April 30, 1962 and June 19, 1962. In *Sanders* v. *Gray*, *supra*, Judge Bell considered the test rather fully, and arrived at the conclusion that the Supreme Court has now adopted the test urged by Mr. Justice Douglas in his dissenting opinion in *South* v. *Peters*, 1950, 339 U. S. 276, 281, that there shall [fol. 193] be no inequality in voting power by reason of invidious discrimination.[5]

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[5] In the course of that opinion the Justice had commented that, "The creation by law of favored groups of citizens and the grant to them of preferred political rights is the worst of all discriminations under a democratic system of government." 339 U. S. at 279. In like vein, Professor James E. Larson of the Bureau of Public Administration of the University of Alabama begins his recent work on "Reapportionment and the Courts" with such statements as:

"Any citizen, if asked, would in all probability admit to a sense of outrage at the suggestion that his vote be counted for less in the election of legislative representatives than the vote of any other citizen. The principle that a vote cast be counted of equal value to any other is so fundamental to our understanding of democracy as to pass unchallenged. Yet, in practice, the system of legislative representation in one American state after another shows a tenacious disregard for this rudimentary requirement of political equality."

and

Judge Bell continued to formulate a test for invidiousness on a consideration of all relevant factors such as rationality or irrationality of state policy, whether or not the system is arbitrary, whether or not the system has a historical basis in our political institutions—federal or state, the presence or absence of political remedy, and the delicate relationship between the federal and state governments under the Constitution.

This Court has reached the conclusion that neither the "67-Senator Amendment," nor the "Crawford-Webb Act" meets the necessary constitutional requirements. We find that each of the legislative acts, when considered as a whole, is so obviously discriminatory, arbitrary and irrational that it becomes unnecessary to pursue a detailed development of each of the relevant factors of the test.

While it is true that this Court is not here primarily concerned with the constitutionality of any of the proposed action of the Legislature as measured by Alabama constitutional standards and requirements, this Court is here concerned with whether or not the Alabama Legislature, in [fol. 194] taking the action defendants now propose to this Court as "effective legislation," has complied with the constitutional standards required by the Constitution of the United States. In addition, this Court recognizes that there are State constitutional standards to be applied and failure to apply those State constitutional standards by this Court, after it has already taken jurisdiction in this case, will amount to a failure to recognize the principles laid down by the Supreme Court of the United States in *Louis-*

"In a democracy, any action or condition which affects the right to vote is an important matter. It is puzzling, therefore, that unequal representation in the state legislature is not a subject to grip the interest and stir the emotions of the public. Aggrieved citizens no longer rise in force to march on state capitals with the complaint that lack of adequate representation is a cause of sufferings which are 'tedious and beyond the patience of a Job to endure.' Drift of taxing power to Washington, apathy, sophistication, and some cynicism about state government have made such displays out of place and in bad taste. Yet state legislatures today stand as a monumental denial of the principles to which we are committed."

ville & Nashville Railroad Co. v. *Garrett*, 231 U. S. 298, and followed in *Wofford Oil Co.* v. *Smith*, 263 F. 396.

The pertinent portion of § 284 of the Constitution of Alabama is as follows:

> "... Representation in the legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendments."

This provision in § 284 has never been considered by the courts of the State of Alabama in an adversary proceeding. This Court is informed that during the interval provided by this Court in its order of April 14, 1962, the Legislature refused to inquire of the Supreme Court of the State of Alabama whether this provision in the Constitution of the State of Alabama could be changed by constitutional amendment as the "67-Senator Amendment" proposes. This section of the Constitution of the State of Alabama has been treated, however, by several Justices of the Supreme Court of Alabama in nonadversary proceedings as follows:

(1) *In re Opinion of Justices*, No. 116, 47 So. 2d 713 (1950), where three of the present members of the Alabama Supreme Court, plus one member now deceased,[6] stated:

> "The official proceedings of the Constitutional Convention of 1901 (see Vol. 3, Official Proceedings, Constitutional Convention of 1901, pages 3906-3924) clearly disclose the purpose of the convention to withhold from the legislature the authority to propose amendments to the organic law which would effectively *change the basis of representation in the legislature*. Unquestionably, the above quoted provision of section 284, supra, withholds from the legislature the power and authority to initiate amendments to the Constitution which would have the effect of changing the basis of representation in the legislature to other than a population basis."

[fol. 195] (2) *Opinion of the Justices*, No. 148, 81 So. 2d 881 (1955), where four of the Alabama Supreme Court

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[6] Justices Brown, Livingston, Lawson and Simpson.

Justices, only two of whom are now on the Court,[7] stated:

> "Surely it is self evident that with the ultimate sovereignty residing in the people, they can legally and lawfully remove any provision from the Constitution which they previously put in or ratified, even to the extent of amending or repealing one of the sections comprising our Declaration of Rights, even though it is provided that they 'shall forever remain inviolate.'"

In the same opinion three of the Alabama Supreme Court Justices, all of whom are presently members of that Court,[8] stated:

> "The only way that the people can amend or change the last sentence of Section 284, supra, is through a constitutional convention. It cannot be done by constitutional amendment."

The manifest uncertainty of the legality of the proposed constitutional amendment, as measured by State standards and as demonstrated by the above-quoted opinions of the Justices of the Supreme Court of Alabama, forces this Court to the conclusion that the Legislature may not have complied with the State Constitution in the passage of such an Act.

That portion of the proposed constitutional amendment providing a senator for each of the 67 counties of the State if approved by the voters would serve to make the discrimination in the Senate even more invidious than at present. Under the proposed amendment, senators elected by 20% of the State population could effectively block any proposed legislation, and senators elected by 14% of the population could prevent the submission of any future proposal to amend the Constitution of the State of Alabama. The present control of the Senate by members representing 25.1% of the people of Alabama would be reduced to control by members representing 19.4% of the people of the

[7] Justices Simpson, Stakely, Merrill and Mayfield.

[8] Justices Livingston, Lawson and Goodwyn.

State. The 34 smallest counties, whose total population is less than that of Jefferson County, would have a majority of the total membership of the Senate. The only conceivable rationalization of this provision is that it is based on political units of the State and is analogous to the requirement [fol. 196] of the Constitution of the United States that the Senate "shall be composed of two Senators from each State." Article I, Section 3, Clause 1, superseded by Amendment 17. The analogy cannot survive the most superficial examination into the history of the requirement of the Federal Constitution and the diametrically opposing history of the requirement of the Alabama Constitution that representation shall be based on population. Nor can it survive a comparison of the different political natures of states and counties. It has been held repeatedly in Alabama that a county derives its power from the State; that a county is but a governmental agency, possessing no power and subject to no duty not originating from the law by which it is created and in which its functions are defined. The Alabama courts have said that a county is nothing more than an involuntary political or civil division of the State, created by statute to aid in the administration of government; that whatever power the county possesses, or whatever duty it is required to perform, originates solely in the statutes creating it, or in the statutes declaring its power and duty. *Askew* v. *Hale County*, 54 Ala. 639; *State* v. *Butler*, 225 Ala. 191, 142 So. 531; *Tuscaloosa County* v. *Alabama Great Southern R. R. Co.*, 227 Ala. 428, 150 So. 328; *Montgomery* v. *State*, 228 Ala. 296, 153 So. 394; *Moore* v. *Walker County*, 236 Ala. 688, 185 So. 175.

In a previous order we indicated our view that the controlling or dominant provision of the Alabama Constitution on the subject of representation in the Legislature was the last sentence of § 284 heretofore quoted. To some extent that thought is emphasized separately as to the House by §§ 198 and 199 and as to the Senate by § 200, but at the same time diluted by other and somewhat conflicting requirements. As to the House, it is provided that each county shall be entitled to one representative and that the total shall be not more than 105 plus the number of new counties subsequently created, so that the total membership of the

House is now 106, of which 67 are distributed one to each of the 67 counties, leaving only 39 to be apportioned among the several counties according to the number of inhabitants in each. As to the Senate, it is provided by § 197 that, "The whole number of senators shall be not less than one-fourth or more than one-third of the whole number of representatives." At present the number of senators is the maximum, [fol. 197] 35. Section 200 provides for "as many senatorial districts as there are senators, which districts shall be as nearly equal to each other in the number of inhabitants as may be, and each shall be entitled to one senator, and no more." It further provides that, "No county shall be divided between two districts, and no district shall be made up of two or more counties not contiguous to each other."

If what we have called the controlling or dominant provision that representation shall be based upon population should be met completely in both Houses, then, without doubt, the State would accord to every person the equal protection of the laws in compliance with the Fourteenth Amendment. It is difficult to determine how far that overriding requirement of the Federal Constitution can be met and also comply with each of the more detailed requirements of the Alabama Constitution. Certainly an earnest effort must be made to meet all such requirements, and it is only in the event that proves impossible that the Supremacy Clause of the Federal Constitution would cause any irreconcilable and conflicting requirement of the State Constitution to give way. Such a result must appear necessary beyond a reasonable doubt before any of the requirements of the State Constitution can be ignored. The result is that we must approach the task of finding a remedy for the existing invidious discrimination within the framework of each of the detailed requirements of the Alabama Constitution.

Those requirements make it obvious that in *neither* the House nor the Senate can representation be based strictly and entirely upon population. There must be differences in the values of votes from the several counties in each House of the Legislature. In *Toombs* v. *Fortson*, *supra*, that court concluded that it must apply the "invidious discrimination" test "in determining whether the plaintiffs'

rights under the equal protection clause have been violated by a system of legislative representation in either or both of the chambers of the State Legislature in such manner or to such a degree as to constitute invidious discrimination as to them."

In that case the court further stated that ". . . we do not find any authoritative decision by the Supreme Court that [fol. 198] causes us to require that in order to give the plaintiff his constitutional rights the state legislature must be constituted of two Houses, both of which are elected according to population." It conceded, however, that there was some basis for that argument in the light of *Scholle* v. *Hare, supra,* especially when consideration is given to Mr. Justice Douglas's dissenting opinion in *MacDougall* v. *Green,* 335 U. S. 281, at pages 287, 289. See also *The Maryland Committee for Fair Representation, et al.* v. *Tawes, Governor,* No. 13920 Equity, from the Circuit Court for Anne Arundel County, Md., filed June 28, 1962. In the present case that doubtful question is further complicated by the detailed requirements of the Alabama Constitution which, as has been said, make it impossible for the representation in *either* House to be based strictly and entirely upon population. The result may well be that representation according to population *to some extent* must be required in *both* Houses if invidious discrimination in the legislative systems as a whole is to be avoided. Indeed, as has also been observed, it is the policy and theme of the Alabama Constitution to require representation according to population in both Houses as nearly as may be, while still complying with more detailed provisions. So long as only extremely partial representation according to population can be achieved in the House, we do not believe that the principle of representation according to population can be completely abandoned in the Senate, as would be done under the "67-Senator Amendment." The provision that the Senate shall consist of a senator from each of the 67 counties, in our opinion, in the light of the other provisions of the Alabama Constitution governing representation in the Legislature, would result in invidious discrimination and a denial of the equal protection of the laws. Compare

Brewar v. *Gray*, Fla. 1936, 86 So. 2d 799. These reasons are in addition to those heretofore given in this opinion.

The proposed reapportionment of the Senate in the "Crawford-Webb Act" is a step in the right direction, but an extremely short step. It does correct a few of the most glaring discriminations by eliminating such single county senatorial districts as Lowndes with a population of 15,417, Wilcox with a population of 18,739, Barbour with a popula-
[fol. 198a] tion of 24,700, and Marengo with a population of 27,098, and puts those small counties into multiple county districts. It makes Etowah, with a population of 96,980, into a single county district. The Act embodies some other improvements on the present system of representation in the Senate. On the other hand, this piece of legislation keeps the control of the Alabama Senate in 27.6% of the people of the State of Alabama. This represents an improvement of only 2.6% over the present control of 25.1%. The vote of a citizen of the Bibb and Perry senatorial districts would be worth twenty times that of a citizen in the Jefferson senatorial district. The vote of a citizen in the 6 smallest senatorial districts would be worth fifteen or more times that of a citizen in the Jefferson senatorial district. In 22 districts, a citizen would have eight or more times as much representation as a citizen residing in the Jefferson district. Other isolated variations are: Lauderdale (population 61,622) is given one-half a senator by being placed with Limestone (population 36,513), making a district of over 98,000 people. This is opposed to Pickens (population 21,882) and Lamar (population 14,271), having one-half a senator each, with a total population of 36,153. To aggravate this, Colbert (population 46,506), Franklin (population 21,988) and Marion (population 21,837), having a total population of over 90,000, are given one-third a senator, while Henry (population 15,286), Hale (population 19,537), Bibb (population 14,357), Perry (population 17,358), Bullock (population 13,462), Lowndes (population 15,417), Marengo (population 27,098) and Sumter (population 20,041), all in the Black Belt area, are each placed in two-county senatorial districts and thereby given one-half a senator. An analysis of the "Crawford-Webb Act" as it proposes to reapportion the Alabama Senate is attached hereto as Appendix "F."

In summary as to the Senate, at best the "Crawford-Webb Act" represents a slight improvement over the present system of representation.

The "Crawford-Webb Act" as it concerns the Alabama House of Representatives is totally unacceptable. The proposed allocation of seats in the House adopts the Alabama constitutional requirement of one per county, with the remaining 39 seats allocated in a manner showing that no [fol. 199] rational reapportionment plan was followed.[9] For instance, each representative from Jefferson County (12 total) and Mobile (6 total) must represent over 52,000 citizens. The Black Belt counties of Bullock, Lowndes, Autauga, Perry, Hale, Greene, Wilcox and Henry, all have representatives speaking for less than 20,000 citizens.

"The Legislature itself must have recognized that the provisions of the "Crawford-Webb Act" for representation in the House were not fair or reasonable when it proposed in the "67-Senator Amendment" a reapportionment of the House of Representatives, based upon reason, with a rational regard for known and accepted standards of apportionment. The "67-Senator Amendment" proposes to apportion the seats in the House of Representatives according to the "Equal Proportions Method." (See footnote 9, *supra.*) It is an endeavor to equalize the representation between counties in the House of Representatives of a fixed size by reducing as much as possible the percentage difference between the representation of each county. This Court accepts and adopts as a part of its order that portion of the proposed "67-Senator Amendment" that relates to the reapportionment of the Alabama House of Representatives. This action will increase the representation of 6 counties as follows: Jefferson from 7 to 17; Mobile from 3 to 8; Calhoun from 2 to 3; Etowah from 2 to 3; Madison from 2 to 3; and Tuscaloosa from 2 to 3. It will decrease the representation of 19 counties as follows: Dallas from 3 to 2; the following each from 2 to 1: Jackson, Chambers, Tallapoosa, Hale, Perry, Sumter, Marengo, Wilcox, Lowndes, Elmore, Butler, Pike, Lee, Russell, Barbour, Henry, Clarke

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[9] See "A Survey of Methods of Reapportionment in Congress," by Edward V. Huntington, Department of Mathematics, Harvard University, Senate Document No. 304, 76th Congress, Third Session.

and Bullock. It will result in apportioning the House seats (106) as follows: Jefferson—17 (population 634,864); Mobile—8 (population 314,301); Montgomery—4 (population 169,210); Calhoun—3 (population 95,878); Etowah—3 (population 96,980); Madison—3 (population 117,348); Tuscaloosa—3 (population 109,047); Dallas, Lauderdale, Morgan, Talladega and Walker—2 each; the remaining counties—1 each.

As a permanent piece of legislation the "Crawford-Webb [fol. 200] Act" would remain in effect not subject to alteration until the next decennial federal census. See §§ 198 and 200 of the Constitution of Alabama of 1901. The Attorney General of Alabama so argues in his brief, as follows: "... if the constitutional amendment is defeated, the statutory bill, if constitutionally sound, will be effective and cannot be changed before the next Federal Census." Because any legislative reapportionment is not subject to change over such a long period, we called attention in our order of April 14, 1962 to the importance of constitutional standards being met "not halfheartedly but fully." As a piece of permanent legislation the provisions of the "Crawford-Webb Act" both as to the Senate and as to the House are totally unacceptable.

Those provisions are unacceptable for the further reason that the effective date of the Act is postponed until the general election to be held in November 1966, so as to await the approval or disapproval by the voters of the "67-Senator Amendment." Such postponement was unnecessary because, as we have already held, the portion of that proposed amendment providing a senator for each of the 67 counties, if approved by the voters, would itself be unconstitutional. No good reason is shown, therefore, why the plaintiffs and others like situated should be thus postponed in the exercise of their rights to the equal protection of the laws, nor why this Court should not now take some steps which may enable the Legislature elected in November 1962 to provide for a fair and proper reapportionment.

The changes resulting from the present order of this Court, unlike those which would result from a permanent Act of the Legislature, will be subject to change by the newly elected Legislature. As indicated in our order of

April 14, such changes should be held to the minimum necessary to release the strangle hold on the Legislature and permit it to reapportion itself.

The duty to reapportion rests on the Legislature. This Court acts in the matter reluctantly because of the long-continued default and total inability of the Legislature to reapportion itself. Even under such circumstances, we think that a federal court, in the light of its delicate relationship with a state legislature, should, so far as is possible, accept such parts of the Acts of the Legislature as [fol. 201] have any merit in framing the order of the Court. For the purpose of the order of the Court to release the strangle hold on the Legislature and permit it to reapportion itself, such parts of the Acts of the Legislature need not meet the standard of constitutionality required of a permanent Act of reapportionment.

We have no hesitancy in accepting as a part of this Court's order the provisions of the proposed "67-Senator Amendment" relating to the House of Representatives. The real difficulty comes as to the Senate. The proposed reapportionment of the Senate in the "Crawford-Webb Act," unacceptable as a piece of permanent legislation, may not even break the strangle hold. The only alternatives, however, which have been suggested or which appear to be subject to approval by the application of mathematical or judicial as distinguished from political standards, would result in very drastic reapportionment, and would probably place 9 counties having over half the population of the State in control of the Senate. Several senators would have to be allotted to Jefferson County and more than one to Mobile County and to Montgomery County. If the provisions of the State Constitution do not permit a single county to be divided into more than one senatorial district, such restriction would have to be held in conflict with the overriding requirement of equal protection of the laws provided by the Federal Constitution. We are not yet convinced of such conflict beyond a reasonable doubt. Despite our doubts as to their sufficiency, we therefore accept, in framing our order, that part of the "Crawford-Webb Act" providing for the reapportionment of the Senate.

It is this Court's intention that the changes relating to the House of Representatives provided in the proposed "67-Senator Amendment" and those relating to the Senate provided in the "Crawford-Webb Act" should go into effect at the general election to be held in the State in November 1962, and with the Legislature as provisionally reapportioned by this Court taking office immediately after said election. It is this Court's further intention to retain jurisdiction of this case and defer any hearing on plaintiffs' motion for a final injunction until the Legislature, as provisionally reapportioned by this order, has an opportunity to provide for a true reapportionment of both Houses of the [fol. 202] Alabama Legislature. The Court hopes that the moderate steps taken by this order may be enough to break the strangle-hold. They certainly will not suffice as any permanent reapportionment. If they should prove insufficient to break the strangle hold, the Court remains under the solemn duty to relieve the plaintiffs and other citizens like situated from further denial of the equal protection of the laws. That much must be accomplished before there can be a final disposition of this case.

In order to effectuate this opinion the Court will issue an appropriate order.

Done this the 21st day of July, 1962.

Richard T. Rives, United States Circuit Judge;
Daniel H. Thomas, United States District Judge;
Frank M. Johnson, Jr., United States District Judge.

[fol. 203]

ANNEX 2 TO MOTION

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 182-62-M-Civil—DD

PETER B. SOBEL, on behalf of himself and all others similarly situated, Plaintiff,

vs.

TOM ADAMS, Secretary of State of the State of Florida, Defendant.

No. 186-62-M-Civil—DD

RICHARD H. M. SWANN, Plaintiff,

vs.

TOM ADAMS, Secretary of State of the State of Florida, et al., Defendants.

Interlocutory Judgment

This consolidated cause came on to be heard this day upon the pleadings, the stipulations made and the evidence submitted, and argument of counsel being heard, it is

Ordered, Adjudged and Decreed:

1. That this statutory three-judge court has been duly constituted, has jurisdiction of the parties and subject matter of the consolidated cause, and has power to adjudicate the controversy presented and to grant such relief as may be appropriate.

2. The Court concludes and hereby determines that the existing constitutional and statutory provisions relating to the apportionment and reapportionment for the nomination

and election of the Senate and the House of Representatives of the Florida Legislature are invidiously discriminatory [fol. 204] against the plaintiffs and others similarly situated, and deny to them equal protection of the law as guaranteed by the Constitution of the United States. Said provisions are hereby found and declared to be prospectively null, void and inoperative.

3. The consolidated cause is hereby continued until August 13, 1962, at which time the Court will consider the relief to be granted by its final judgment.

Done and Entered this 23rd day of July, 1962.

Warren L. Jones, United States Circuit Judge;
Wm. A. McRae, Jr., United States District Judge;
David W. Dyer, United States District Judge.

[fol. 205]

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 182-62-M-Civil—DD

PETER B. SOBEL, on behalf of himself and all others similarly situated, Plaintiff,

vs.

TOM ADAMS, Secretary of State of the State of Florida, Defendant.

No. 186-62-M-Civil—DD

RICHARD H. M. SWANN, Plaintiff,

vs.

TOM ADAMS, Secretary of State of the State of Florida, et al., Defendants.

Before Jones, Circuit Judge, and McRae and Dyer, District Judges.

Jones, Circuit Judge:

In these cases, here consolidated, like questions are presented and the same relief is sought. They come before us on final hearing. By the facts stipulated and those of which we take judicial notice it clearly appears, and the Court finds, that the existing provisions of the Constitution and statutes of the State of Florida which relate to the apportionment for the nomination and election of the members of the Senate and House of Representatives of the Legislature of Florida are invidiously discriminatory against the plaintiffs in the within causes and against others similarly situated. Such provisions are in deprivation of the rights of the plaintiffs and their class guaranteed by the Constitution of the United States. Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663.

[fol. 206] Each of the three representatives in the Florida House of Representatives from Dade County, the most populous county in the State, represents the equivalent of 311,000 people according to the 1960 Federal census. The member from Gilchrist, the least populous county, would represent 2,868 residents. The five most populous counties average one representative for each 106,000 people. The five least populous counties average one representative for each 3,266 people. The membership of the Florida Senate, considered on a basis of representation of numbers, would show a similar disparity between the more populous and the less populous areas.

The defendants have set forth for us the history of legislative apportionment in Florida. They have outlined for us the efforts made to procure apportionment on a less discriminatory basis. These efforts, particularly in recent years, have met with little success and such changes as have been made fall far short of affording any substantial correction of the inequality of representation. Indeed, it would seem that, because of population increases and shifts, the disproportion increased rather than lessened. Without discrediting the efforts of those who have sought to mitigate the conditions existing from time to time, those efforts did not produce any substantial alleviation of the preexisting invidious discriminations in apportionment, nor do they

now afford any rational basis for a reapportionment that will meet the requirement of equal protection of the law. They do not constitute a defense to the claims for relief here asserted.

We do not now decide whether or not this Court has the power to enjoin the submission to the voters of Florida of the now pending amendment to the Constitution of Florida [fol. 207] which, if adopted, would reapportion the Florida Legislature. We do not relinquish that power if it exists. We think that it is appropriate to do no more at this time than to say that it is the present opinion of the Court that the reapportionment, which the amendment would make, does not meet the Federal Constitutional requirement of equal protection.

The defendants point to *Shiver* v. *Gray, Secretary of State*, 5th Cir. 1960, 276 F. 2d 568, as a case squarely in point and a precedent which should control our decision. It need only be noted that this opinion was rendered prior to and is in conflict with *Baker* v. *Carr*, supra, and is not to be followed.

We find that the Court has jurisdiction of the parties and of the subject matter of the causes; that justiciable matters are presented for decision, and that the plaintiffs have standing to bring and maintain these suits.

We conclude that the constitutional and statutory provisions of the State of Florida, which provide for the apportionment and reapportionment, are null, void and prospectively inoperative.

The plaintiffs and the class represented by them are entitled to such relief as will afford them equal protection of the laws. Before the entry of a final judgment or decree the Court should have the benefit of further evidence and argument on the manner in which the relief should be awarded. The more desirable means of accomplishing the necessary reapportionment is through state action. The duty to place the state in compliance with the requirement of the United States Constitution rests primarily and rests heavily upon the state itself. Should the state fail or neglect to perform this obligation with that dispatch which the urgency of the matter requires, then the less desirable [fol. 208] reapportionment by judicial decree would be re-

quired. It seems that there is ample time for a valid reapportionment to be made and become effective prior to the time for the convening of the regular legislative session in 1963.

In order to permit the State of Florida and its officials to undertake a compliance with the requirements of the United States Constitution, it seems appropriate that the entry of a decree be deferred for a reasonable period of time. If, at the end of that period, the Florida Legislature has been convened in special session for effectuating, by legislation or by amendment to the Florida Constitution, or both; or if at that time some other state action has been undertaken, an application for a further continuance would be looked upon with favor. Otherwise the Court will then proceed to fashion a remedy of reapportionment by judicial decree in such manner as may seem to the Court best adapted to meet the requirements of equal protection.

Dated at Miami, Florida, this 23rd day of July, 1962.

Warren L. Jones, United States Circuit Judge.
Wm. A. McRae, Jr., United States District Judge.
David W. Dyer, United States District Judge.

[fol. 209]

IN THE COURT OF APPEALS OF MARYLAND

No. 140—Adv.

September Term, 1962

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al.,

v.

J. MILLARD TAWES, Governor, et al.

Brune, C.J., Henderson, Hammond, Prescott, Horney, Marbury, Macgill, James (Specially assigned), JJ.

OPINION BY HENDERSON, J.—September 25, 1962

Brune, C.J., Prescott and Marbury, JJ. dissent.

[fol. 210] On July 23, 1962, we filed a per curiam order affirming a declaratory decree of the Circuit Court for Anne Arundel County that Article III, sec. 2 of the Maryland Constitution is valid and constitutional. We now state the reasons for our order.

This is the third time this case has been before this Court. On April 24, 1962, following the Supreme Court's ruling in *Baker* v. *Carr*, 369 U.S. 186, and its per curiam order in *Scholle* v. *Hare*, 369 U.S. 429, we reversed a decision of the Circuit Court for Anne Arundel County which had sustained the appellees' demurrers to the bill of complaint. We held, by a divided court, that the bill, alleging that the apportionment prescribed by the Maryland Constitution violated the Fourteenth Amendment to the United States Constitution, stated a justiciable cause of action cognizable in the State courts, and remanded the case in order that the chancellor might determine "whether or not an invidious discrimination does exist with respect to representation in either or both houses." *Md. Committee* v. *Tawes*, 228 Md. 412, 436. We also said that "inquiry into the rational basis for such apportionment seems to be called for."

On May 28, 1962, the chancellor, after argument but without hearing testimony, held on motion for summary judgment that the composition of the House of Delegates, prescribed by Article III, sec. 5 of the Maryland Constitu-
[fol. 211] tion, violated the Fourteenth Amendment, in that the distribution of numerical voting strength in voting for members of the House of Delegates, accorded to voters in the four suburban and more populous counties, was arbitrary and unreasonable. He reserved decision as to the Senate.

The Governor promptly convened a special session of the General Assembly, which for the first time in the history of this State added nineteen Delegates to the House of Delegates, to be voted for in the 1962 elections, by "stop-gap" legislation rather than by proposing a constitutional amendment. A proposed constitutional amendment failed

of passage. The appellants entered an appeal from the chancellor's order reserving decision as to the Senate and we remanded the case with directions that the chancellor decide the point. The present appeal is from that decision. No question is presented as to the validity of the "stop-gap" legislation or the reapportionment of the House of Delegates.

Article III, section 1 of the Maryland Constitution provides: "The Legislature shall consist of two distinct branches; a Senate, and a House of Delegates; and shall be styled the General Assembly of Maryland."

Art. III, sec. 2 provides: "The City of Baltimore shall be divided into six legislative districts as near as may be of equal population and of contiguous territory, and each of said legislative districts of Baltimore City, as they may from time to time be laid out, in accordance with the pro- [fol. 212] visions hereof, and each county in the State, shall be entitled to one Senator, who shall be elected by the qualified voters of the said legislative districts of Baltimore City and of the counties of the State, respectively, and shall serve for four years from the date of his election."

Throughout the colonial period the upper house consisted of the Governor and Council, appointed by the proprietor, and modeled after the English House of Lords. They also sat as a provincial court and court of appeals from the county courts. See Bond, Court of Appeals of Maryland, p. 4 et seq. See also 1 McMahon, Historical View of the Government of Maryland (1831), p. 148. That they had a certain sectional distribution was fortuitous. While the House of Delegates was selected on a county basis (four from each) the councilors were selected from among the most eminent landowners and office holders, serving at the will of the Governor.[1] In the Constitution

[1] The last colonial legislature convened on March 23, 1774, and the twelve councilors present were: Benedict Calvert, John Ridout, John Beale Bordley, George Stewart, Daniel of St. Thomas Jenifer, Benjamin Ogle, Philip Thomas Lee, Richard Lee, William Hayward, Daniel Dulany (the Younger), William Fitzhugh and George Plater. Archives of Md. LXIV.

of 1776, Art. XV provided for a Senate to be elected by the vote of Delegates elected two from each county and one each from the City of Annapolis and Baltimore Town. At that time there were eight counties on the eastern shore and ten counties on the western shore. These electors were directed to elect six senators from residents of the [fol. 213] eastern shore and nine senators from residents of the western shore, "men of the most wisdom, experience and virtue, above twenty-five years of age, residents of the state above three whole years next preceding the election, and having therein real and personal property above the value of one thousand pounds current money." See Niles, Maryland Constitutional Law, p. 5. By the amendment proposed by Chapter 197, Acts of 1836, and ratified in 1837, the Senate was reconstituted to consist of one [fol. 214] senator from each county (of which there were then twenty by reason of the establishment of Allegany and Carroll Counties) and one from Baltimore City. The method of indirect election by an electoral college was abandoned. This distribution was continued in the Constitution of 1851, and so far as the counties are concerned, was continued in the Constitutions of 1864 and 1867, and in subsequent amendments. The last county to be formed, Garrett, was erected in 1872. See 3 Scharf, History of Maryland, p. 778. From that date the counties have numbered twenty-three.

However, Baltimore City, which had achieved the status of a political subdivision independent of Baltimore County in 1851, was allotted three senators, one from each legislative district, in 1864 and this provision was continued in 1867. It received an additional legislative district and senator in 1900 and two more in 1922, subsequent to the annexation of portions of Baltimore County and Anne Arundel County by Chapter 82 of the Acts of 1918.

The counties of Maryland have always been an integral part of the state government. St. Mary's County was established in 1634 contemporaneous with the establishment of the proprietary government, probably on the model of the English shire, associated with the important office of sheriff. 1 Scharf, *supra*, p. 124 et seq. Indeed, Kent County had been established by Claiborne before the landing of

the Marylanders and he established New Kent County in Virginia after he was ousted from Maryland *vi et armis* by the Calverts. We have noted that there were eighteen counties at the time of the adoption of the Constitution of [fol. 215] 1776. They have always possessed and retained distinct individualities, possibly because of the diversity of terrain and occupation. Baltimore County, the most populous in the State, still has no incorporated towns, and until the recent adoption of a charter form of government, was governed by three elected commissioners who exercised the executive functions, while most of the legislative functions were exercised by its representatives in the General Assembly. Baltimore City, having acquired the unique status of an independent political subdivision, has maintained its own local government, subject to control by the General Assembly, since 1867. Only two counties, Montgomery and Baltimore have adopted the charter form of government under Art. XI of the State Constitution. While it is true that the counties are not sovereign bodies, having only the status of municipal corporations, *Howard County* v. *Matthews*, 146 Md. 553, 561, they have traditionally exercised wide governmental powers in the fields of education, welfare, police, taxation, roads, sanitation, health and the administration of justice, with a minimum of supervision by the State. In the diversity of their interests and their local autonomy, they are quite analogous to the states, in relation to the United States.

It is an interesting historical fact that the mode of selecting the members of the United States Senate adopted in 1789 was modeled, to a considerable extent, upon the Maryland Senate of 1776. In addressing the Constitutional Convention on August 14, 1787, Madison opposed a proposal that senators be paid by the states on the ground that it would tend to impair the stability and independence of [fol. 216] the Senate, which, he remarked, "was formed on the model of that of Maryland." 4 The Writings of James Madison, edited by Gaillard Hunt, G. B. Putnam's Sons (1903) p. 202. Again, in No. 63 of The Federalist Papers, Madison in answering a contention that a Senate appointed not immediately by the people, and for a term of six years, would acquire a dangerous preeminence in the government

and finally transform it into a tyrannical aristocracy, stated that "the constitution of Maryland furnishes the most apposite example. The senate of that State is elected, as the Federal Senate will be, indirectly by the people; and for a term less by one year only, * * *. If the Federal Senate, therefore, really contained the danger which has been so loudly proclaimed, some symptoms at least of a like danger ought by this time to have been betrayed by the senate of Maryland; but no such symptoms have appeared. On the contrary * * * the Maryland constitution is daily deriving from the salutary operation of this part of it, a reputation in which it will probably not be rivalled by that of any State in the Union". The members of the Federal Senate continued to be elected by the state legislatures until the adoption of the Seventeenth Amendment in 1913. It is also interesting to note that when Maryland abandoned the selection of state senators by an electoral college in 1837, it adopted a provision for one senator from each county and from Baltimore City, following the federal pattern of geographical representation in the upper house.

The question before us is not whether such a provision [fol. 217] is wise or unwise but simply whether, as alleged in the bill, membership in both houses of a bicameral legislature must "be based on, or reasonably related to, the present population" of the various political subdivisions of the State. Since the provision of one senator from each county has been repeatedly approved and incorporated in the Maryland Constitution by the people of Maryland, it cannot conceivably offend the Maryland Constitution. The sole claim is that it violates the equal protection clause of the Fourteenth Amendment.

Equal protection has been judicially equated to a prohibition against invidious discrimination. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489. Not every discrimination is invidious, nor will it be set aside "if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426 and cases cited. We think a complete justification for the election of state senators on a county basis is to be found in the historical precedents cited above. The idea of a bicameral legislature, with the upper branch selected on a territorial rather than a popular

basis, was a familiar one in 1837 and it is familiar today. The very purpose of having two houses was that each would be a check upon the other, and prevent the passage of hasty and ill-conceived legislation. A different method of selection was essential to the bicameral plan. No more natural or logical basis could be suggested than that the viable and long established political subdivisions be accorded representation, as they had been in election of electors under the Constitution of 1776.

[fol. 218] The bicameral concept is not one that has become obsolete with the passage of the years. It has been repeatedly recognized by Congress and the President, subsequent to the adoption of the Fourteenth Amendment, in approving the constitutions of states seeking admission to the Union. See *Coyle* v. *Smith*, 221 U.S. 559. In the most recent cases, Alaska and Hawaii, their Constitutions each contain provisions for senatorial districts of marked inequality in popular representation. In Alaska one of the senators represents more than fifteen times as many voters as the other. Moreover, the constitutions of a majority of the states that ratified the Fourteenth Amendment contained provisions for an upper house based on a geographical distribution of senators, without reference to population. It can hardly be maintained that in voting for ratification they were, in effect, voting to invalidate their own state constitutions.

The appellants argue that the Federal Constitution furnishes neither analogy nor precedent for the composition of the Maryland Senate, on the ground that the states which adopted the Federal Constitution were sovereign bodies. The argument overlooks the fact that thirty-seven states were admitted to the Union after 1789, which were not and had never been sovereign bodies, with the possible exception of Texas. It also overlooks the fact that it was never suggested that senators vote by states. They were clearly members of a national congress, designed for the very purpose of achieving a greater stability and a stronger cen-

[fol. 219] tral government than under the Articles of Confederation. In any event, the consequence and effect upon voting rights are the same, whether the voter be voting for United States senator or state senator. We think it is

hardly conceivable that a different principle would apply in the one case than in the other.

We are of course aware that the government of the United States, within its delegated powers, may possess rights not retained by the states. But where civil rights are concerned there is still truth in the ancient adage that what is sauce for the goose is sauce for the gander. When the Supreme Court held in *Brown* v. *Board of Education*, 347 U.S. 483, that the equal protection clause prohibited the states from maintaining racially segregated schools, it also held in *Bolling* v. *Sharpe*, 347 U.S. 497, decided the same day, that the Federal Government was likewise barred by the Fifth Amendment. The relation between the two amendments seems sufficiently close to negative a conclusion that a provision like that for the Federal Senate, U.S. Const., Art. I, sec. 3, would be offensive to either.

The appellants argue, however, that the federal plan has not been followed in Maryland, since an exception has been made in the case of Baltimore City, which has been subdivided into six election districts and now has six senators. The argument proves too much. The fact that the original plan has been modified in one instance does not require that it be totally abandoned. There are reasons for a distinction. In 1864, when Baltimore City acquired three [fol. 220] senators, the State was in the control of the Union Army and many of the southern sympathizers in southern Maryland and the eastern shore had been disfranchised. There were special reasons for the continuance of extra representation in 1867, in 1900, and again in 1920, when the population of Baltimore comprised fifty-one per cent of the population of the State. Baltimore, even prior to the Civil War, was a great seaport, an industrial center and the hub of commerce and communication. Despite the distrust for city governments, dominated around the turn of the century by "rings" and "bossism", it mustered enough political power to enlarge its representation. Until quite recently it has been underrepresented in the House of Delegates, as well as in the Senate, although the picture has changed with the population explosion in the suburban counties, and it is not far out of line. The instant case is a contest for political power between the larger and the

smaller counties, and Baltimore City is not concerned. It may also be noted that there is no constitutional requirement of territorial uniformity under the Fourteenth Amendment. *Salsburg* v. *Maryland*, 346 U.S. 545; *Ocampo* v. *United States*, 234 U.S. 91.

We find nothing in the Supreme Court cases to support the appellants' claim of invalidity in the apportionment of the Maryland Senate. *Baker* v. *Carr*, *supra*, merely decided that a justiciable question was presented. The remand in *Scholle* v. *Hare*, *supra*, was for the express purpose of allowing the Michigan Court to give further consideration to the question presented in the light of *Baker* v. *Carr*. [fol. 221] We do not read into that remand any intimation as to how the case should be decided on the merits. Nor do we attach any significance to the similar remand in the New York case of *W.M.C.A., Inc.* v. *Simon*, 370 U.S. 190. Upon remand, the Michigan Court, by a vote of four to three, held that in "(t)he absence of any semblance of design or plan in the present senatorial districts," the state constitutional provision approved by the voters in 1952, was invalid. But Mr. Justice Stewart stayed the order for reapportionment, stating: "It is very clear the issues decided by the Michigan Supreme Court are new issues; ones that were not decided in *Baker* v. *Carr*." We think it is significant that Mr. Justice Stewart, concurring in the *Baker* case, said: "The Court does not say or imply that there is anything in the Federal Constitution 'to prevent a State, acting not irrationally, from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of its people.' * * *."

"In *MacDougall* v. *Green*, 335 U.S. 281, the Court held that the Equal Protection Clause does not 'deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former.' * * *." We find no intimation in later Supreme Court cases that this is not still the law.

[fol. 222] We think there is little to be gained from a review of cases in other states and in the lower federal

courts. A typical statement is that of the Tennessee Court upon remand of *Baker* v. *Carr*, 31 L.W. 2003 (June 22, 1962): "[E]qual protection requires that * * * apportionment in at least one house shall be based, fully and in good faith, on numbers of qualified voters without regard to any other factor." See also *Sims* v. *Frink*, 30 L.W. 2512 (Ala.), *Toombs* v. *Fortson*, 30 L.W. 2605 (Ga.) (May 25, 1962) and *Caesar* v. *Williams*, 371 P.2d 241 (Ida.) rehearing denied May 8, 1962. In reading some of the decisions attention must be paid to whether the particular constitution requires representation based on population in both houses, as some do. The action taken by state or lower federal courts, once the question of justiciability is conceded, may turn on the construction of the state constitution and not present a federal question at all. Such cases are readily distinguishable. In any event, there is no unanimity of opinion to be drawn from the cases, and the final determination must await further light from the Supreme Court of the United States.

[fol. 223]

IN THE COURT OF APPEALS OF MARYLAND

No. 140—Adv.

September Term, 1962

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al.,

v.

J. MILLARD TAWES, Governor, et al.

Brune, C. J., Henderson, Hammond, Prescott, Horney, Marbury, Macgill, James (Specially Assigned), JJ.

DISSENTING OPINION BY BRUNE, C. J., IN WHICH PRESCOTT AND MARBURY, JJ. CONCUR—Filed September 25, 1962

[fol. 224]

Brune, C.J., with whom Prescott and Marbury, JJ., join, dissenting:[1]

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[1] But for the recent (and fortunately temporary) illness of Judge Prescott, who wrote the majority opinion on the first appeal in this case, this opinion would have been written by him.

The question on this appeal is fundamentally one of Federal constitutional law—the meaning and application of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States with regard to the apportionment of representation in the legislature of a State. That was also true on the first appeal, but the question as then presented was two-pronged and related to the apportionment of representation (a) in the House of Delegates and (b) in the Senate of the General Assembly of Maryland. As a result of legislation enacted after the first appeal, the present controversy is limited to the apportionment of representation in the State Senate. The trial court determined, following a second remand of the case, that if the House were properly apportioned (as he thought it had been by the Special Session of the General Assembly following the determination just prior to the Special Session that its then existing apportionment would not be sustainable as to the 1962 election), there was no need to reapportion representation in the Senate on any basis of population. He based his conclusion upon an analogy to the Federal system under which the House of Representatives is apportioned on the basis of population, but each of the States, regardless of population, has two members of the Senate. He accordingly dismissed the bill as to re-[fol. 225] apportionment of the Senate. By a per curiam order joined in by four of the seven judges this Court affirmed the order of dismissal. We dissented.

In the majority opinion on the first appeal, *Maryland Committee for Fair Representation* v. *Tawes*, 228 Md. 412, 180 A. 2d 656, we stated some familiar propositions which are equally apposite here: that the Constitution of the United States and laws made in pursuance thereof are parts of the supreme law of the land and are paramount to any contrary provisions of the Constitution or laws of this State, that this is so both under the Supremacy Clause of the Constitution of the United States and under Article 2 of the Maryland Declaration of Rights, the latter in effect writing into our State Constitution this limitation upon everything else therein expressed; and that interpretations of the Constitution of the United States by the Supreme Court of the United States are binding upon us. We be-

lieve that there is no dispute or difference between the members of this Court on those propositions. The last of them was recognized by the majority opinion on the first appeal (228 Md., at 418 and 428) and also by the dissenting opinion (228 Md., at 448). Our difference with the present majority is based upon our understanding of the effect of recent decisions of the Supreme Court bearing upon the subject in hand.

[fol. 226] The first of those cases is, of course, *Baker* v. *Carr*, 369 U. S. 186. It makes clear, we think, that the Equal Protection Clause of the Fourteenth Amendment does afford protection against the debasement or dilution of voting rights through State legislative apportionment of representation. The exact point at which such protection will be afforded in any specific case; it is true, is not determined in *Baker* v. *Carr;* nor, we think, could it well have been. The basis of the claim of the plaintiffs-appellants was discrimination through the debasement or dilution of their voting rights through the apportionment of representation in the Tennessee Legislature (both houses) without regard to population. The second proposition determined by the Supreme Court is thus stated (369 U.S., at 197-98, 82 S. Ct., at 699): "(b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief." And near the end of the opinion of the Court Mr. Justice Brennan further said (369 U.S., at 237, 82 S. Ct. at 720): "We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment."

We think it also clear both from what we have just quoted and from footnote 15 to the opinion of the Court in *Baker* [fol. 227] that the right for which the appellants were entitled to seek protection and which might be found, upon trial of the merits, to have been violated was a Federal constitutional right. Footnote 15 (369 U.S., at 195, 82 S. Ct., at 698) reads in part as follows: "The complaint, in addition to the claims under the Federal Constitution, also alleges rights, and the General Assembly's duties, under the

Tennessee Constitution. Since we hold that appellants have —if it develops at trial that the facts support the allegations—a cognizable federal constitutional cause of action resting in no degree on rights guaranteed or putatively guaranteed by the Tennessee Constitution, we do not consider, let alone enforce, rights under a State Constitution which go further than the protections of the Fourteenth Amendment."

The majority opinion in the instant case appears to take a different view and to confuse the remedy with the right. In the last paragraph of the majority opinion cases in other States and in the lower Federal courts are dismissed with the comment that "there is little to be gained from a review of [such] cases." The opinion cites several of them decided since *Baker* and then goes on to say:

> "In reading some of the decisions attention must be paid to whether the particular constitution requires representation based on population in both houses, as some do. The action taken by state or lower federal courts, once the question of justiciability is conceded, may turn on the construction of the state constitution and not present a federal question at all."

[fol. 228] Where compliance with State constitutional requirements will also vindicate the Federal right shown to have been infringed, a decree in accordance with State constitutional provisions is an obviously desirable form of remedy and the otherwise possibly very difficult problem of determining an appropriate remedy (a problem not solved by *Baker*) may become relatively simple. However, it remains clear under *Baker* that a Federal right exists quite independent of State constitutional provisions and is in no way dependent upon them for its enforcement through some appropriate remedy.

The second recent Supreme Court case which seems to us highly pertinent to the present controversy is *Scholle* v. *Hare*, 369 U. S. 429. That case involves an attack solely on the apportionment of the Michigan Senate. The Michigan House is apportioned about as closely as may be on a basis of population. This fact was certainly well known to

the Supreme Court of the United States when it remanded the *Scholle* case to the Supreme Court of Michigan for further consideration in the light of *Baker* v. *Carr, supra.* It is difficult for us to imagine a clearer indication (short of an express statement) than is given by this remand that the mere fact that one house of a State legislature is apportioned strictly in accordance with population does not im- [fol. 229] munize the apportionment of the other from attack under the Fourteenth Amendment on the ground that gross malapportionment of representation as regards population constitutes invidious discrimination.

In the majority opinion of this Court on the first appeal in this case we expressed the views (228 Md., at 433-34) that no precise and inflexible formula for representation is required or can be stated, that the State is allowed every reasonable latitude with regard thereto and that any discrimination which may exist therein will not be set aside if any state of facts reasonably may be conceived to justify it, and that "there is a strong implication in the *Baker* decision that there must be some reasonable relationship of population, or eligible voters, to representation in the General Assembly, if an apportionment is to escape the label of constitutionally-prohibited invidious discrimination." We adhere to those views and we think the remand of the *Scholle* case supports them. The remand of that case appears to us to have been for the purpose of having the Michigan Court determine whether or not there was a rational ground upon which to support the allocation of representation in the Michigan Senate, which rather clearly involved marked disparities in voting power between different senatorial districts as regards population. The maximum disparity in Michigan, we note, was approximately 15 to 1 as against a maximum disparity in Maryland of [fol. 230] approximately 32 to 1. We think that the remand of the case of *W.M.C.A.* v. *Simon*, 370 U.S. 190, 82 S. Ct. 1234, for the court below (the United States District Court for the Southern District of New York) to be "the first to consider the merits of the federal constitutional claim, free from any doubts as to its justiciability and as to the merits of alleged arbitrary and invidious geographical discrimination" supports our interpretation of the purpose of the

remand of the *Scholle* case. As we read the opinions filed in the Michigan Supreme Court following remand, the Court divided sharply on whether there was or was not a rational basis for the Michigan senatorial apportionment fixed by a constitutional amendment adopted in that State in 1952. In at least one respect, which may be of some significance, the Michigan case differs from the situation in Maryland. There, at the same election at which the apportionment under attack in *Scholle* was adopted by a popular majority of approximately 300,000 votes, another proposed constitutional amendment which would have apportioned the Senate on the basis of population was defeated by a popular majority of approximately 500,000 votes.[2] No similar choice has ever been submitted to popular vote in Maryland. Despite this popular vote and against historical-geographical arguments and the analogy to the Federal system, a majority of four out of the seven members of the Michigan Supreme Court participating held the 1952 [fol. 231] apportionment invalid. The case is now on appeal to the Supreme Court and the order of the Supreme Court of Michigan has been stayed by Mr. Justice Stewart.

The majority of this Court in the present case seems to accept tacitly, if not expressly, the view that if one house of the Maryland General Assembly (the Senate) may be apportioned on a basis which ignores disparities of population, the other house (the House of Delegates) must be apportioned with due regard to population, and assumes that the House of Delegates now is so apportioned. It is true that the apportionment of the House is not under attack on this appeal and no question with regard thereto is now before us. It is also true, however, that even as reapportioned by the May, 1962 Special Session of the General Assembly, considerable disparities still exist in a number of instances, though previous disparities have been materially reduced. Reference to Appendix A appended hereto will show the past and present situations with regard to the House and also the situation with regard to the Senate,

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[2] Cf. *W.M.C.A.* v. *Simon* on remand, 31 L.W. 2121, where a somewhat similar factor was one of several grounds upon which the existing New York apportionment was upheld.

which has not changed. There is no such close relationship between population and representation as in the case of the Michigan House, or between registered voters and representation as is declared necessary by the Federal District Court in Tennessee after remand of the *Baker* case. (31 L.W. 2003.) Surely, the present Maryland apportionment is not so closely related to population as is that of the [fol. 232] House of Representatives of the Congress of the United States. In that respect the Federal analogy is far from perfect.

Nor is it perfect in other respects. We still believe that there is some difference between the relationship of the States and the National Government and that of the counties and the State Government. We do not deny that State sovereignty is not what it once was and is far less significant today than it was in 1787 or 1789. It is true, however, that the Constitution of the United States does offer the States with small populations (no matter when they may have become members of the Union) a guarantee against being deprived of equal representation in the Senate without their consent. Counties, at least in Maryland, remain creatures of the State and they have no such constitutional guarantee.

Also, we think that the appellants are right in contending that Maryland does not fully follow the Federal pattern in another respect. The majority attempts to minimize the departure from the rule of one senator per political subdivision made in the case of Baltimore City. With all due deference to our brothers' reading of local history, the fact seems to stand out that these concessions to Baltimore City were granted, albeit grudgingly, in recognition of Baltimore's relatively large population and economic importance. There is no corresponding provision in the Federal Constitution.

Strictly, as a matter of history, the pattern of one senator per county or comparable political subdivision was in force only from 1851 to 1864. From 1837 to 1851 Baltimore City, [fol. 233] which was a part of Baltimore County, had one senator. Since 1864 it has had first three, later four, and since 1922, six. At the time of the last increase it had slightly over 50% of the population of the State, according

to the 1920 census. With 6 senators out of 29 it had about 21% of the representation in the Senate. It seems hardly necessary to point out that none of the six legislative districts comprised in the City of Baltimore constitutes a political subdivision of the State comparable to a county.

The majority attempts to bolster the Federal analogy by the argument that those who drafted the Fifth Amendment (many of whom had also participated in drafting the original Constitution) could not have thought that Due Process of Law guaranteed by the Fifth Amendment was infringed by the Equal Representation Clause applicable to the Senate, and then by first equating Due Process under the Fifth Amendment with Due Process under the Fourteenth (this equation being, we think, true) and by then further equating the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. This argument seems to us highly strained. We know of no basis, historical or otherwise, for thinking that the provision for the equal representation of the States in the Senate—a representation of which no State may be deprived without its consent—was or was intended to be amended, limited, or construed by the Fifth Amendment. We may further note that, although in many instances the Due Process and Equal Protection Clauses may overlap, these two Clauses are separately expressed in the Fourteenth Amendment and that they con- [fol. 234] stitute limitations upon the States, not upon the Federal Government. A further, and we think in itself sufficient, answer to this contention is that *Baker* v. *Carr*, *supra*, rests squarely and expressly on the Equal Protection Clause and is the basis for the remand of *Scholle*.

The imperfections of the analogy to the Federal system are a relatively minor factor in the case, though the analogy itself is one of the main grounds upon which the majority relies. The other ground—and perhaps it really includes the Federal analogy ground—is that history furnishes a rational basis for geographical representation without regard to present glaring disparities in population between areas.

Up to a point, which it may be difficult to locate precisely, there is doubtless some merit to an argument based solely on history, but there must be a limit to its efficacy. A phrase

with which all lawyers are familiar is the old saying that the reason for something is historical rather than logical. How far can we go in adopting history as the guide for determining whether there is a rational basis for a patent discrimination? It is almost ironic that this malapportionment of representation to population in this case was (as well as is) worse in the Senate than in the House. Surely, the historical-geographical argument cannot be pushed to the logical extreme of contending that an uninhabited geographical area is entitled to representation in a legislative body. (We need not even stop to consider the problem of who would represent it.) Geography simply cannot be [fol. 235] divorced from people as a basis for representation. How large must the population of a geographical political subdivision be in relation to that of other such subdivisions in order to afford a reasonable base for representation? We grant that no exact mathematical rule or guide should be attempted by this Court; but it seems to us that when the disparity in population reaches the point where it has no rational justification, the limit of permissible discrimination is passed. A disparity of 32 to 1, we think, does exceed the permissible limit. In votes for the election of Senators that disparity exists as between voters in Baltimore County and voters in Kent County. If there were no other comparable disparities, it might be of little significance, but there are other comparable disparities; as reference to the figures in Appendix A will show. Thus the disparity as between voters in Prince George's County and in Talbot County is approximately 16½ to 1, as between voters in Montgomery County and in Garrett County it is approximately 17½ to 1, and as between voters in Anne Arundel County and Queen Anne's County it is approximately 12½ to 1. The maximum disparity in *Scholle* was 15 to 1. Without multiplying comparisons of one county with another, the following composite figures (taken from Appendix B), in which representation in the Senate is divided roughly into thirds, will reveal the general disparity between the most populous subdivisions of the State and the less populous subdivisions:

[fol. 236]

Units	1960 Population	Approximate % of State Population	Approximate % of Senate
Four most populous Counties and Baltimore City (10 Senators)	2,336,409	75	34½
Ten least populous Counties (10 Senators)	214,930	7	34½
Nine intermediate Counties (9 Senators)	549,350	18	31

To carry comparisons a step further, the fifteen least populous counties can elect 15 of the 29 Senators. These 15 counties have a combined population of 450,160, or a little over 14% of the State's total population of 3,100,869. That is, approximately one-seventh of the population can elect a majority of the State Senate.

Further comment can scarcely add emphasis to the figures shown in the above table and in the paragraph immediately following it.

The supposed Federal analogy was at least as well known to the Supreme Court as to us, but it did not prevent remand for consideration on the merits of apportionment in the State Senate in *Baker*, in *Scholle*, or in *W.M.C.A.* We cannot think of any logical reason for remanding a case to a lower court for the consideration of a patently untenable ground of constitutional attack. Of the three cases just cited *Scholle* seems most pertinent on this matter. The majority opinion in the instant case seeks to avoid what we think is a necessary implication from the remand of *Scholle* [fol. 237] on this point by saying that the Supreme Court did not decide the question. We think that what the Supreme Court has not decided is whether or not there is a rational basis for the Michigan senatorial apportionment.

We think that the majority of this Court dismisses rather too lightly decisions of the courts of other States or of lower Federal courts from a review of which it finds little to be gained. We think that on the whole these other recent

cases seem to support our views rather than those of the majority. In general, they regard both houses of a State legislature as subject to a requirement that there shall be some reasonable relationship between population and representation. This may be shown by a rational explanation of a departure from an exact ratio, and such an explanation will be more readily accepted as to one house if the other is exactly proportioned to population. Some, such as *Baker* v. *Carr*, *supra*, on remand (31 L.W. 2003) have deferred action as to one house if the other is almost exactly apportioned according to population.

The opinion of the United States District Court for the Middle District of Alabama, filed July 21, 1962, in *Sims* v. *Frink*, 205 F. Supp. 245, is carefully reasoned, and, in our estimation, supports the view that even exact, or almost exact, apportionment of one house in a State legislature in accordance with population does not entirely dispense with the need for some reasonable regard for population in the apportionment of the other. To like effect is another [fol. 238] very recent Federal District Court decision (July 23, 1962) in the Southern District of Florida, in *Sobel* v. *Adams*, —— F. Supp. ——. See, however, the more recent opinion of that court, —— F. Supp. ——,[3] also reported in the Miami Herald of September 6, 1962, upholding a proposed Florida constitutional amendment which affects both House and Senate, bringing apportionment of the former much more nearly in line with population, but permitting considerable disparities as to the Senate. It was held that population need not be "a major factor" in reapportionment of the Senate. The Supreme Court of Vermont (on July 20, 1962) in *Mikell* v. *Rousseau*, —— A. 2d ——, held the apportionment of the Senate of that State to be unconstitutional. A Kansas County District Court reached a like conclusion with regard to the Kansas legislature on July 27, 1962. A decision of the Court of Common Pleas of Dauphin County, Pennsylvania, cited by the appellees, expresses views in accord with what we regard as the general trend

[3] Subsequent to our filing of this opinion we have been advised that the two Florida decisions will be combined to make one report in the Federal Supplement; at this writing no citation is available.

and simply defers action. It does not involve a final determination on the merits. Nor did *Caesar* v. *Williams*, 371 P. 2d 241 (Ida.), decided April 3, 1962, reach a final decision on the merits. In Colorado the State Supreme Court in *Stein* v. *General Assembly*, 31 L.W. 2075, deferred requiring action but a Federal District Court in *Lisco* v. *McNichols*, 31 L.W. 2107, shortened the time of deferment.

The United States District Court for the Middle District of Tennessee, on remand of *Baker* v. *Carr*, *supra*, appears to have taken a view similar to ours that there should be an [fol. 239] "equitable" basis of reapportionment of the Tennessee Senate, even though it need not be "fully related to voting strength." See also *Toombs* v. *Portson*, 205 F. Supp. 248 (N.D., Ga.), 30 L.W. 2605, in which the District Court held that at least one house would have to be apportioned *strictly* on a population basis and did not decide whether both houses would have to be so apportioned.

A three-judge Federal District Court in Oklahoma has acted to bring about reapportionment of the legislature of that State. *Moss* v. *Burkhart*, —— F. Supp. ——, commented on in the "Judicial Highlights" section of the Federal Reporter Advance Sheets for July 9, 1962. Further action in that case (for which we presently have no F. Supp. citation) is reported in *Facts on File*, August 2-8, 1962, to have been taken on August 3, 1962.

In *Sweeney* v. *Notte*, —— A. 2d —— (R.I.), 31 L.W. 2060, the Supreme Court of Rhode Island, though holding that it could not take action to enforce its views in a reapportionment case said: "The Attorney General contends, and petitioners concede, that apportionment along geographical, county, municipal or urban versus rural lines does not necessarily constitute a denial of equal protection if the rationale of such methods can be justified. We are in full accord with such contention, but it is equally true that historical recourse to such apportionment formulae cannot be justified if it results in invidious discrimination. The dilution of the vote of a majority of electors to one-fourth of that enjoyed by others is, in our opinion so unjust as to be [fol. 240] invidiously discriminatory."

See also *Sanders* v. *Gray*, 203 F. Supp. 158 (N.D., Ga), involving the Georgia primary election unit vote rule. Prob-

able jurisdiction has been noted but an application to advance for argument was denied in that case, *sub nom., Gray v. Sanders,* 370 U.S. 921, by the Supreme Court. That Court did not adopt the view of Mr. Justice Harlan that leave should be granted the appellants for a stay of the injunction issued by the District Court pending the determination of the appeal.

We also refer to the remarks of two University of Virginia political scientists, Messrs. Paul T. David and Ralph Eisenberg, at the recent annual convention of the American Political Science Association in Washington. They discussed the need for representation with reasonable regard to population in both houses of a state legislature and expressed views thereon, as reported in the Washington Post of September 6, 1962 (pp. 1 and A 8) in general accord with ours.

In the present case we think that the gross disparities which exist in relative voting power (and which are not even disputed, for they cannot be) cast upon the proponents of the existing apportionment the burden of showing a rational basis for such departures from any regard for population as a basis for representation. This burden, in our estimation, has not been met. Such provisions as we have here seem much more than are required to assure a proper diffusion of political restraint, to paraphrase the diffusion [fol. 241] of political initiative spoken of in *MacDougall* v. *Green,* 335 U.S. 281, at 284. Neither the long continuance of disparities nor the magic phrase "Federal analogy" seems to us to furnish the rational basis for such disparities which is necessary to save them from constituting "invidious discriminations" under the Fourteenth Amendment, as we think that Amendment has been authoritatively interpreted by the Supreme Court in the cases above referred to and recently decided by that Court.

We, therefore, think that the decree of the Circuit Court should have been reversed.

See Opposite ☞

Unit	Population 1960	Prior to 5/31/62		After 5/31/62		SENATE	RELATIVE VALUES OF VOTES		
		No. of Delegates	No. Represented by Each Delegate	No. of Delegates	No. Represented by Each Delegate	No. of Senators	Per Cent(%) of Value of Vote to Statewide average		
							For Delegates		For Senator
							Prior to 5/31/62	After 5/31/62	
State-wide	3,100,689	123	25,210	142	21,837	29	100	100	100
Allegany	84,169	6	14,028	6	14,028	1	179	156	129
Anne Arundel	206,634	6	34,439	7	29,519	1	73	74	52
Baltimore	492,428	6	82,071	13	37,879	1	31	58	22
Calvert	15,826	2	7,913	2	7,913	1	319	276	675
Caroline	19,462	2	9,731	2	9,731	1	259	224	550
Carroll	52,795	4	13,196	4	13,196	1	191	165	203
Cecil	48,408	3	16,136	3	16,136	1	156	135	221
Charles	32,272	2	16,136	2	16,286	1	155	134	328
Dorchester	29,666	4	7,417	4	7,417	1	340	294	360
Frederick	71,930	6	11,988	6	11,988	1	210	183	149
Garrett	20,820	3	6,807	3	6,807	1	370	321	534
Harford	76,722	4	19,181	4	19,181	1	131	114	139
Howard	36,158	2	18,076	2	18,076	1	139	121	296

Unit	Population	Prior to 5/31/62		After 5/31/62			Per Cent (%) of Value of Vote to Statewide Average*		
		No. of Delegates	No. Represented by Each Delegate	No. of Delegates	No. Represented by Each Delegate	No. of Senators	For Delegates		For Senator
							Prior to 5/31/62	After 5/31/62	
State as a Whole	3,100,689	123	25,210	142	22,837	29	100	100	100
Kent	15,481	2	7,741	2	7,741	1	385	282	691
Montgomery	340,928	6	56,821	10	34,093	1	44	64	32
Prince George's	357,395	6	59,566	10	35,740	1	42	61	30
Queen Anne's	16,569	2	8,285	2	8,285	1	304	264	644
St. Mary's	38,915	2	19,458	2	19,458	1	129	112	249
Somerset	19,623	3	6,541	3	6,541	1	385	334	595
Talbot	21,578	3	7,193	3	7,193	1	358	308	665
Washington	91,219	6	15,203	6	15,203	1	166	144	317
Wicomico	49,050	4	12,263	4	12,263	1	206	178	218
Worcester	23,733	3	7,911	3	7,911	1	319	276	350
Baltimore City	939,024	96	26,001 **	39	24,082 **	6	97**	91**	68**

* Average number, statewide, of persons represented by each of 29 Senators, 106,920

** Citywide average without regard to inequalities between Legislative Districts

See Opposite ☞

Group 1 Baltimore City and Four Most Populous Counties:	1960 Population	Approximate % of Population of State	No. of Senators	Approximate % of Senate
Baltimore City	939,024	30.22	6	20.70
Baltimore County	492,428	15.88	1	3.45
Prince George's County	357,395	11.53	1	3.45
Montgomery County	340,928	10.99	1	3.45
Anne Arundel County	206,634	6.67	1	3.45
	2,336,409	75.29	10	34.50
Group 2 **Ten Least Populous Counties**				
Kent County	15,481	.50	1	3.45
Calvert County	15,826	.51	1	3.45
Queen Anne's County	16,569	.53	1	3.45
Caroline County	19,462	.63	1	3.45
Somerset County	19,623	.63	1	3.45
Garrett County	20,420	.66	1	3.45
Talbot County	21,578	.70	1	3.45
Worcester County	23,733	.77	1	3.45
Dorchester County	29,666	.96	1	3.45
Charles County	32,572	1.05	1	3.45
	214,930	5.94	10	34.50
Group 3 **9 Intermediate Population Counties:**				
Howard County	36,152	1.17	1	3.45
St. Mary's County	38,915	1.26	1	3.45
Cecil County	48,408	1.56	1	3.45
Wicomico County	49,050	1.58	1	3.45
Carroll County	52,785	1.70	1	3.45
Frederick County	71,930	2.32	1	3.45
Harford County	76,722	2.48	1	3.45
Allegany County	84,169	2.71	1	3.45
Washington County	91,219	2.94	1	3.45
	549,350	17.72	9	31.05

[fol. 245]

IN THE COURT OF APPEALS OF MARYLAND

No. 140—Adv.

September Term, 1962

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al.

v.

J. MILLARD TAWES, GOVERNOR, et al.

Brune, C.J., Henderson, Hammond, Prescott, Horney, Marbury, Macgill, James (specially assigned), JJ.

DISSENTING OPINION BY PRESCOTT AND MARBURY, JJ.—
Filed: September 25th, 1962

[fol. 246]

PRESCOTT AND MARBURY, JJ., separately dissenting:

As indicated therein, we fully concur in the able dissenting opinion of Chief Judge Brune. In addition, we deem it appropriate to call attention to the contrast between the conclusion reached by the present majority and what was said in the majority opinion on the first appeal in which two of the majority on the present appeal concurred.

Plaintiffs' bill of complaint alleges malapportionment in both the State Senate and the House of Delegates. The case first reached us after the trial court sustained demurrers to the bill. We reversed, stating that the Supreme Court had made "a strong implication in the *Baker* decision that there must be some reasonable relationship of population, or eligible voters, to representation in the General Assembly, if an apportionment is to escape the label of constitutionally-prohibited invidious discrimination." We then remanded the case with directions to the chancellor to determine whether representation in either or both Houses of the General Assembly was apportioned on a basis involving such discrimination. The chancellor found that the representation in the House was unconstitutionally malap-

portioned, but made no finding as to the Senate. We again [fol. 247] remanded for a decision as to the Senate. It is elementary that if the well-pleaded allegations of the bill failed to state a cause of action with reference to representation in the Senate, neither remand insofar as it concerned that branch of the Assembly was proper. Upon the remand no testimony whatever was taken. The defendants filed an answer in which they admitted substantially all of the allegations of the bill relating to malapportionment, but, even though the majority opinion stated what we quoted above, the defendants stated in their answer that "representation in the Maryland Senate need not be based on nor reasonably related to the present population of the Counties and Baltimore City [and the present majority opinion sustains this contention]." Essentially, the case reaches us now in the same posture as the first appeal, the only difference being that in the first appeal the demurrers admitted the well-pleaded allegations of the bill, and in the present appeal the answer admits them with minor and insignificant exceptions. On those facts which were held sufficient on the first appeal to state a cause of action as to the Senate as well as the House, the present majority now finds "nothing the Supreme Court cases [no case on malapportionment has been decided by the Supreme Court since our first opinion] to support the appellants' claim of invalidity in the apportionment of the Maryland Senate."

[fol. 248]

IN COURT OF APPEALS OF MARYLAND

No. 140—Adv.—September Term, 1962

MARYLAND COMMITTEE FOR FAIR REPRESENTATION et al.

v.

J. MILLARD TAWES, GOVERNOR, et al.

MANDATE

Appeal from the Circuit Court of Anne Arundel County.

Filed: July 2, 1962

July 23, 1962: Decree affirmed, appellants to pay the costs. Per Curiam Order. Opinion to follow. Brune, C.J., Prescott and Marbury, JJ., dissent.

August 2, 1962: Motion for Reargument filed.

September 11, 1962: Motion denied.

September 25, 1962: Opinion filed by Henderson, J., in which Brune, C.J., Prescott and Marbury, JJ., dissent.

September 25, 1962: Dissenting opinion by Brune, C.J. in which Prescott and Marbury, JJ., concur.

September 25, 1962: Dissenting opinion by Prescott and Marbury, JJ.

STATEMENT OF COSTS:

In Circuit Court:		
Record	$15.00	
Stenographer's Costs	30.00	
In Court of Appeals:		
Filing Record on Appeal		$ 20.00
Printing Brief for Appellant		738.50
Reply Brief		229.01
Portion of Record Extract—Appellant		

Appearance Fee—Appellant	10.00
Motion for Reargument	5.00
Printing Brief for Appellee	228.60
Portion of Record Extract—Appellee	
Appearance Fee—Appellee	10.00

[fol. 249] [File endorsement omitted]

IN THE COURT OF APPEALS FOR MARYLAND

Nos. 94 and 140 (Advanced)

September Term, 1962

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al., Appellants,

vs.

J. MILLARD TAWES, GOVERNOR, et al., Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed September 28, 1962

I. Notice is hereby given that the Maryland Committee for Fair Representation, and all of the individual appellants of record herein, appeal hereby to the Supreme Court of the United States from the final judgment of the Court of Appeals for Maryland, filed in this case on September 25, 1962, a ruling which affirmed a decree of the Circuit Court for Anne Arundel County (Judge O. Bowie Duckett) that was filed in this action on June 28, 1962, denying the declaratory and injunctive relief sought by appellants' bill of complaint and adjudging Section 2 of Article III of the Constitution of the State of Maryland and the representation provided thereunder, to be valid and constitutional and not in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States. This appeal is taken pursuant to 28 U.S.C. 1257(2), and as permitted by 28 U.S.C. 2101(c).

II. The Clerk of this Court will please prepare a transcript of the record in this case (No. 13920 Equity in the Circuit Court for Anne Arundel County; No. 52, September Term, 1961, and Nos. 94 and 140 (Advanced), September Term, 1962, in this Court), for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The bill of complaint, with Exhibits A, B, C, D, E, F, G and H attached thereto, filed August 12, 1960.

2. Appellees' demurrers filed on September 10th and 16th, 1960.

[fol. 250] 3. Opinion and order of the Circuit Court for Anne Arundel County, sustaining appellees' demurrers and dismissing the bill of complaint, entered on February 21, 1961.

4. Opinion and mandate of the Court of Appeals for Maryland, entered on April 25, 1962.

5. Petition by Montgomery County, Maryland to appear as *amicus curiae*, and order of the Circuit Court for Anne Arundel County, Maryland permitting the same, entered on May 4, 1962.

6. Appellees' answers to the bill of complaint, with Exhibit 1 attached, filed on May 14, 1962.

7. Appellants' motion for summary judgment, filed on May 16, 1962.

8. Opinion of the Circuit Court for Anne Arundel County, Maryland, filed on May 24, 1962.

9. Decree of the Circuit Court for Anne Arundel County, Maryland, filed on May 28, 1962.

10. Order for an appeal, filed by appellants on May 28, 1962, in No. 94, September Term, 1962.

11. Order of the Court of Appeals for Maryland remanding the case to the Circuit Court for Anne Arundel County, filed on June 8, 1962.

* * * * * * * *

13. Supplemental opinion by the Circuit Court for Anne Arundel County, Maryland, filed on June 28, 1962.

14. Decree of the Circuit Court for Anne Arundel County, Maryland, filed on June 28, 1962.

15. Appellants' order for appeal, filed on June 28, 1962.

16. *Per curiam* order of the Court of Appeals for Maryland, entered on July 23, 1962 in No. 140 (Advanced), September Term, 1962.

17. Appellants' motion for reargument, filed on August 1, 1962.

18. Order of the Court of Appeals for Maryland denying motion for reargument, filed on September 11, 1962.

19. Opinion of the Court of Appeals for Maryland, filed on September 25, 1962, including dissenting opinions.

20. This notice of appeal, filed with the Court of Appeals for Maryland on September 28, 1962.

[fol. 251] 21. The Clerk's certificate of the above requested record.

III. The following questions are presented by this appeal:

1. Are the appellants and other citizens and eligible voters who reside in the five most populous political subdivisions of the State of Maryland being subjected to invidious discrimination and unreasonable dilution in the exercise of their rights of suffrage, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, through the representation afforded them in the Maryland General Assembly by Section 2 of Article III of the Maryland Constitution, which permits the five political subdivisions containing in excess of 76% of the population of Maryland only 34% of the total membership of the State Senate, while allowing a minority of 14% of the population of the State residing in less populous political subdivisions to elect a majority of the members of the Maryland State Senate?

2. Are equal protection and due process of law, as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States being denied appellants and other citizens and voters of Maryland similarly situated, by the total representation provided for in both Houses of the Maryland General Assembly, under which citizens and eligible voters residing in the five most populous subdivisions of the State, and comprising over 76% of Maryland's population, are afforded only 55% and 34%, respectively, of the present membership of the Maryland House of Delegates and State Senate?

Alfred L. Scanlan, 9806 Singleton Drive, Bethesda, Maryland.

John B. Wright, 12 Church Circle, Annapolis, Maryland.

Johnson Bowie, County Office Building, Towson, Maryland.

Of Counsel: Shea & Gardner, 734 15th St., N.W., Washington, 5, D.C.

Filed: September 28, 1962.

[fol. 252] Proof of Service (omitted in printing).

[fol. 253] Clerk's Certificate to foregoing Transcript (omitted in printing).

[fol. 254]

SUPREME COURT OF THE UNITED STATES

No. 544—October Term, 1962

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al., Appellants,

vs.

J. MILLARD TAWES, GOVERNOR, et al.

Appeal from the Court of Appeals of the State of Maryland.

ORDER NOTING PROBABLE JURISDICTION—June 10, 1963

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.